CLERK'S COPY.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 215.

HARRIET T. JAMES, ADMINISTRATRIX OF CHARLES P. JAMES, DECEASED, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED MARCH 28, 1905.

(19,687.)

(19,687.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 215.

HARRIET T. JAMES, ADMINISTRATRIX OF CHARLES P. JAMES, DECEASED, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

	Original.	Print.
Caption	1	1
Petition	1	1
Petitioner's Exhibit A—Letters of administration	5	3
Amended petition	7	4
Traverse	8	5
Argument and submission	8	5
Findings of fact	9	5
Conclusion of law	9	6
Opinion	10	6
Judgment	16	13
Application for and allowance of appeal	17	14
Clerk's certificate	18	14

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 20, 1905.

1 Court of Claims.

No. 21959.

HARRIET T. JAMES, Administratrix of Charles P. James, Deceased,
vs.
UNITED STATES.

1.—*Petition. Filed June* 30, 1900.

The petitioner, Harriet T. James, respectfully states:

1. She is a citizen of the United States and a resident of the city of Washington, D. C.

2. Her father was Charles P. James, late a citizen of the United States and a resident of the city and District aforesaid, who departed this life on the 9th day of August, 1899, leaving him surviving as his only next of kin and heirs-at-law two daughters, the petitioner, Harriet T. James, who is unmarried, and Edith James Wallach, the wife of Richard Wallach, Washington, D. C.

3. The petitioner was appointed on the 2d day of March, 1900, by the supreme court of the District of Columbia, sitting as an
2 orphans' court in and for said District, administratrix of her said father, and duly qualified as such. She presents herewith a copy of the letters of administration issued to her and prays that it be considered a part hereof, marking it "Petitioner's Exhibit A."

4. That said Charles P. James was on or about the 29th day of July, 1879, during the recess of the Congress, appointed by the President an associate judge of the supreme court of the District of Columbia, being a court of the United States, and forthwith qualified as such and entered upon the duties of his office, and upon the convening of the Congress in December of that year he was nominated by the President to said office, and, being confirmed by the Senate, qualified and entered upon the duties thereof upon the 17th day of December, 1879.

5. The said Charles P. James served continuously as such associate judge from the time of his appointment, as in the next preceding paragraph set forth, until on or about December 1, 1892, when he resigned his office, after having held his commission as such more than ten years and after having attained the age of more than seventy years, being at the date of such resignation in the seventy-fourth year of his age.

6. The petitioner is advised and informed, and so states the fact to be, that her said father was during the residue of his natural life entitled to receive the same salary which was by law payable to him at the time of his resignation.

7. She is further advised and informed, and so states the fact to

3 he, that the salary which was by law payable to him at the time of his resignation was the sum of five thousand dollars ($5,000) per annum, at which rate the Congress, by an act approved March 3, 1891, entitled "An act making appropriations for the legislative, executive, and judicial expenses of the Government for the fiscal year ending June 30, 1892, and for other purposes" (26 S. L., p. 947), declared the chief justice of the supreme court of the District of Columbia and the five associate judges should be paid.

8. She is further advised and believes that for the year ending June 30, 1893, the said Charles P. James received a lesser salary, to wit, four thousand dollars ($4,000), than that to which he was legally entitled, to wit, five thousand dollars ($5,000), but that subsequently, in some manner to the petitioner not now known, but which if discovered she prays she may, if material, insert herein by way of amendment, such deficit for that year was paid to him, petitioner's intestate.

9. For the fiscal years subsequent to that ending June 30, 1893, to wit, 1893-'4, 1894-'5, 1895-'6, 1896-'7, 1897-'8, 1898-'9, and for the period of the fiscal year 1899-1900, between July 1, 1899, and the date of the death of the said Charles P. James, to wit, August 9, 1899, he, the said Charles P. James, was paid only at the rate of four thousand dollars ($4,000) per annum, although he was legally and equitably entitled to be paid at the rate of five thousand dollars ($5,000) per annum.

4 10. There was justly due and owing petitioner's intestate at the time of his death and there is now justly due and owing to the petitioner as his administratrix, after allowing all just credits and offsets, the sum of six thousand one hundred and seven dollars and seventy-five cents ($6,107.75), being the difference between the salary actually paid to him and the salary to which he was legally and rightfully entitled for the period of six years one month and nine days, as in the next preceding paragraph set forth.

11. Petitioner is further advised and so states that the claim in this her petition preferred is founded as well upon acts of Congress embodied in section 714 of the Revised Statutes of the United States, and the aforesaid act approved March 3, 1891, as upon the implied contract between the United States and petitioner's intestate arising from petitioner's intestate's acceptance and discharge of the office as judge of a court of the United States under the legislation above recited and the facts in this petition averred.

12. The petitioner further states that so far as she knows no action has been had on this claim, either in the Congress or by any of the departments of the United States; that she is the legal owner thereof, subject to the right of her said sister as one of the next of kin of said decedent; that there has been no assignment of the whole or any part thereof; that she is justly entitled to the amount claimed, after allowing all just claims and set-offs; that she and her said intestate have at all times borne true allegiance to the Government of the

United States, and have not in any way voluntarily aided, abetted, or given encouragement to a rebellion against the same.

13. The premises considered, the petitioner prays the award and judgment of this honorable court that she is, as administratrix of Charles P. James, deceased, entitled to have and recover of the United States the sum of $6,107.75 so as above demanded, and that such award and judgment may be duly made, enrolled, and executed; then she may have such other, further, and general relief as the nature of her case may require; and, as in duty, etc., she will ever pray, etc.

HARRIET T. JAMES,
Administratrix of Charles P. James, Deceased.

MORGAN H. BEACH,
Attorney-in-fact and Solicitor,
344 D Street N. W., Washington, D. C.

PETITIONER'S EXHIBIT A.

No. 9401, Administration Docket 26.

In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

DISTRICT OF COLUMBIA, *To wit:*

The United States of America to all persons to whom these presents shall come, Greeting:

Know ye that on the 2d day of March, in the year of our Lord 1900, administration of all the goods, chattels, and credits of Charles P. James, late of the District of Columbia, deceased, was by the supreme court of the District of Columbia aforesaid granted and committed unto Harriet T. James, who, as administratrix of said deceased, first executed a bond to the United States, with good sureties approved by the said court, in the penalty of three hundred dollars, condition for the faithful performance of the trust in her reposed, she having taken the required oath, and whose appointment is unrevoked and still in force.

Witness Charles C. Cole, justice, holding the special term of the said supreme court for orphans' court business, this 29th day of June, in the year of our Lord one thousand nine hundred, and of the Independence of the United States the one hundred and twenty-fourth.

Test:
[SEAL.]

GEO. E. JOHNSON,
Acting Register of Wills of the District of Columbia.

[U. S. int. rev. stamp, 10c., canceled.]

DISTRICT OF COLUMBIA, *ss:*

Before the undersigned this day personally appeared Harriet T. James, who, being first duly sworn, deposed and said that she has read the foregoing petition by her subscribed as administratrix of Charles P. James, deceased, and that she knows the contents thereof; that the matters and things therein stated as of her own knowledge are true and those stated upon information and belief she believes to be true.

HARRIET T. JAMES.

Subscribed and sworn to before me this 29th day of June, 1900.
[NOTARIAL SEAL.] CHARLES S. BUNDY,
Notary Public, D. C.

7 II.—*Amended Petition. Filed February* 4, 1903.

No. 21959.

HARRIET T. JAMES, Administratrix of Charles P. James, Deceased, Claimant.

vs.

THE UNITED STATES.

Comes now the claimant above named, by her attorney of record, and amends the petition by her heretofore filed herein, as follows, to-wit:

1. Strike out paragraph 10 in said petition, and in lieu thereof insert the following:

10. There was justly due and owing petitioner's interstate, at the time of his death, and there is now justly due and owing to the petitioner as his administratrix, after allowing all just credits and offsets, the sum of $6,688.90, being the difference between the salary actually paid to him and the salary to which he was legally and rightfully entitled for the period of six years eight months and eight days, to wit, from December 1, 1892, to August 9, 1899.

2. Amend paragraph 13 in said petition by striking out the sum for which judgment is therein prayed, to-wit, $6,107.75; and, in lieu thereof, insert the sum $6,688.90, as the amount for which judgment is prayed herein.

HARRIET T. JAMES,
Administratrix of Charles P. James, Deceased, Claimant.
By A. A. HOEHLING, JR.,
Attorney for Claimant.

III.—*Traverse. Filed February* 12, 1903.

the Court of Claims of the United States, December Term, A. D. 1904-5.

No. 21959.

HARRIET T. JAMES, Adm'x Chas. S. James,
vs.
THE UNITED STATES.

And now comes the Attorney General, on behalf of the United States, and answering the petition and amended petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

L. A. PRADT,
Assistant Attorney General.

IV.—*Argument and Submission.*

This cause was argued and submitted on the 12th day of February 1903.

V.—*Findings of Fact and Conclusion of Law. Filed May* 25, 1903.

HARRIET T. JAMES, Administratrix of the Estate of Charles P. James, Deceased,
v.
THE UNITED STATES.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following findings of fact.

I.

Claimant is administratrix of Charles P. James, late a citizen of the United States and a resident of Washington, D. C., who departed this life August 9, 1899.

II.

Claimant's intestate was at one time an associate judge of the supreme court of the District of Columbia, which office he resigned December 1, 1892, after having held his commission more than ten years, and having attained the age of 74 years.

III.

His salary at the date of his appointment was $4,000 per annum, at which rate he was paid until July 1, 1891.

IV.

From July 1, 1891, to June 30, 1892, his salary was $5,000 per annum, and from June 30, 1892, to December 1, 1892, he was paid at the same rate.

V.

On his retirement he was paid, during the residue of his natural life, at the rate of only $4,000 per annum.

VI.

The period embraced in the claim herein is from December 1, 1892, to August 9, 1899, being six years eight months and eight days, at the rate of $1,000 per annum, aggregating the sum of $6,688.90.

Conclusion of Law.

Under the foregoing findings of fact, the court decides, as a conclusion of law, that the claimant's petition be, and the same is hereby dismissed.

10 VI.—*Opinion of the Court.*

HOWRY, *J.*, delivered the opinion of the court:

Plaintiff, as administratrix of the estate of the late Judge James, brings this action to recover the difference between the salary paid to him after his retirement as an associate justice of the supreme court of the District of Columbia and the salary which she claims should have been paid from the beginning of the judge's retirement to the period of his death. The claim is sought to be founded upon section 714 of the Revised Statutes, which provides as follows:

"When any judge of any court of the United States resigns his office, after having held his commission as such at least ten years and having attained the age of 70 years, he shall, during the residue of his natural life, receive the salary which by law was payable to him at the time of his resignation."

Judge James resigned December 1, 1892, having held his commission more than ten years, and being then in the seventy-fourth year of his age. He died August 1, 1899. During his retirement he was paid at the rate of $4,000 per annum, besides a small sum hereinafter mentioned, while it is claimed he should have been paid at the rate of $5,000 per annum.

It is contended that the supreme court of the District of Columbia

is not one of the inferior courts established under that part of Section I of Article III of the Constitution, which declares that

"The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their offices during good Behaviour, and shall, at stated Times, receive for their services, a Compensation, which shall not be diminished during their Continuance in Office."

By Section II this judicial power is extended to all cases in law and equity therein enumerated.

The contention ignores the constitutional guaranty of judicial independence arising from tenure of office and permanence in salary, and assumes that the supreme court of the District of Columbia is merely a legislative creation which Congress may abolish or change at will, without regard to incumbents, as in courts created for the Territories under a different article of the Constitution, from which it would result, if the contention be sound, that the supreme court of the District of Columbia is not a court of the United States within the meaning of section 714 of the Revised Statutes.

In *Embry v. Palmer* (107 U. S. R., 3) the Supreme Court of the United States designated the supreme court of the District of Columbia as a court of the United States. This would end the discussion did it clearly appear from the decision that the court meant to declare a difference between Territorial courts and courts provided for the seat of Government. In delivering the opinion, Mr. Justice Matthews said: "That the supreme court of the District of Columbia is a court of the United States results from the right of exclusive legislation over the District which the Constitution has given to Congress."

It is argued, however, that the designation meant a court of the United States in the same sense that a court established by Congress in a Territory with circuit or district court jurisdiction meant. And that whether such courts be established in a Territory or in the District of Columbia, neither can exercise any of the judicial powers enumerated in Section II of Article III of the Constitution, but that they can only exercise like powers.

Territorial courts are established under the general authority of Congress or by virtue of Section III of Article IV of the Constitution, which declares that "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

Defining the status of the two superior courts created by the act of March 30, 1822, for the establishment of a Territorial government in Florida, Chief Justice Marshall said they were not constitutional courts, but "legislative courts created in virtue of the general right of sovereignty which exists in the Government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States." (*American Ins. Co. v. Canter*, 1 Pet., 511, 546.) But all the provi-

sions of the Constitution must be considered and construed together in determining whether in the organization and control of Territorial governments all acts, including those establishing judicial tribunals, were not designed for purposes of temporary government while other acts, under which permanent courts were expected or required to be provided, included the right to make these permanent judicial bodies the depositary of some part of the judicial powers conferred by the Constitution on the General Government.

Under section 8 of Article I of the Constitution, Congress have the power "to exercise exclusive legislation in all cases whatsoever over such district (not exceeding 10 miles square) as may, by cession of particular States and the acceptance of Congress, become the seat of the Government of the United States."

The 10 miles square that might by cession of particular States and the acceptance of Congress become the seat of government was meant by the framers of the Constitution to be as permanent as the States from whose boundaries the square was to be taken. The seat of government, unlike the territory acquired by conquest, treaty, and cession, was not to be donated or accepted as a transitory territorial boundary. It was a part of the constitutional scheme to provide for the perpetual use of enough territory free from State control to meet the demands of a permanent national seat of government. It would seem anomalous if the courts to be provided for the seat of government were not intended to be courts of the United States capable of receiving the judicial power provided by Article III as far as this judicial power could be made to apply and extend.

The legislation of Congress from the beginning of the Government to the present time is largely in keeping with the view that Congress have legislated upon the theory that the courts of the District of Columbia are permanent tribunals capable of receiving some part of the judicial power which can be conferred on courts in the District of Columbia as well as on courts of the United States in the States.

12 The judiciary act of 1789 included the area which later formed the District of Columbia. (1 Stats., 73.)

When, by the act of February 13, 1801 (2 Stats., 89), Congress passed an act to provide for the more convenient organization of the courts of the United States, the District of Columbia was included within a Federal district created by the act. By the act of February 27, 1801 (2 Stats., 103), entitled "An act concerning the District of Columbia," the laws then in force in the State of Virginia and in the State of Maryland were continued in force in that part of the District which had been ceded by those States. A separate circuit court for the District was made, in effect with all the powers of circuit courts and with judges of the same kind of tenure as provided for the court of the circuit from which the District was omitted. The District of Columbia was thus, to all intents and purposes, segregated as a single circuit from the other circuits and stood alone as a circuit court *sui generis*. It possessed most of the powers belonging to cir-

cuit and district courts of the United States and nearly all the jurisdiction that belonged to either of them, and also had some powers which belonged to neither of those courts.

The District of Columbia is within the meaning of the uniformity clause of the Constitution under the decision in the well-known case of *Loughborough v. Blake* (5 Wheat, 317). The District is a part of the United States for all purposes, domestic and international. It must continue so. Certain provisions of the Constitution, which apply only to the States as such, or to the citizens of the States as such, may not be operative in the District or to the citizens of the District, because the subjects to which they relate, or the conditions to which they apply, do not exist. Thus, citizens of the District of Columbia do not possess certain political rights that citizens of the States respectively have and enjoy. The constitutional right to bring a suit in a United States court against a citizen residing in any State of the Union is denied to a citizen here, because the District of Columbia is not a State within the meaning of that term as used in the Constitution. (*Hepburn v. Ellzey*, 2 Cranch, 445.) But the courts here have judicial power as permanent and lasting as elsewhere, and possess those subjects of jurisdiction which constitutionally are given to them. To be inferior courts under Article III they need not possess all the powers and subjects of jurisdiction precisely like every other court of the United States. The requisite jurisdiction is rightfully conferred if within the subjects of the jurisdiction so conferred classes of matter fall which the courts so created may rightfully entertain.

The complete and exclusive jurisdiction of Congress over the District is incompatible with the proposition that the District was intended to be organized for judicial purposes as foreign territory which Congress might dispose of, or as territory to be held so tentatively that the judicial power could not be lodged in tribunals as national in character as courts provided in those States which had ceded the District for national purposes forever. Territory acquired for the seat of government continues to be national. The rights of persons to their lives, liberty, and property are the same in the District as in the States, and the judicial powers of the supreme court, created for the District, are the same and are to be exercised at law and equity in the same manner for the protection of life and property as in the United States courts created for the States as near as may be.

13 But because the supreme court of the District of Columbia is vested with some powers not enumerated in Article III of the Constitution it is argued that they can not be constitutional courts like those provided for by section 714 of the Revised Statutes.

The proposition disregards the permanency intended by the organic law for any and all courts thereafter to be established at the seat of government. It ignores the design of the framers of the fundamental law to create a court of the United States at the capital, where the judicial power provided by Article III should be lodged most appropriately and as far as practicable during the existence of

the Government. Courts established for sections of the country pending the admission of such country as States imply the exercise of temporary functions which differentiate such tribunals from those whose powers imply continuity and permanence.

The proposition further ignores the right of Congress in the creation of courts under Article III to confer some of the judicial powers therein enumerated on certain of the inferior tribunals authorized to be established and other of the powers enumerated on certain other inferior tribunals authorized to be created by the same article. This court, for example, "is constituted one of those inferior courts which Congress authorizes" under Article III (*United States v. Klein*, 13 Wall., 145); but the jurisdiction it has of contracts between the Government and the citizen from which appeals may be taken directly to the Supreme Court is a larger jurisdiction than that conferred by the act of March 3, 1887 (24 Stats., 505), on other courts of the United States, as, by that act, the district and circuit courts of the United States are given concurrent jurisdiction with this court to a limited extent only of suits against the United States.

Various acts not necessary to notice were superseded by the judiciary reorganization act of March 3, 1863 (12 Stat., 762), by which enactment the present supreme court of the District of Columbia was established. The judges thereof (of whom there were four), one of whom was denominated "chief justice," were to be appointed by the President by and with the advice and consent of the Senate, and were to hold their offices "during good behavior." That is the phraseology of Section I of Article III. Their salaries were fixed, and subsequent statutes increased the number of judges and the amount of their compensation. Congressional, Departmental, and Executive construction since that time—a period of forty years—continued to fix the supreme court of the District of Columbia as a tribunal established under Article III, and protected its judges by the Constitution. The rule that the contemporaneous construction of a statute by those charged with its execution should not be disregarded except for cogent reasons, and unless it be clear that such construction is erroneous, applies with even greater force in the construction of a provision of the Constitution so long and continuously acted upon by the two co-ordinate departments of the Government as the legislative and executive. The acquiescence of Congress and the Executive, for a long time, by which the rights of parties have been determined and adjudged for many years, do not make constitutional that which is unconstitutional; but to say the least, the ambiguity and doubt are too great for us to say that the interpretaion which recognizes the supreme court of the District of Columbia as one of the inferior courts created by Article III of the Constitution is erroneous.

14 The District of Columbia had been subject to the Constitution while it was a part of the territory of those States which ceded it to the Federal Government. The Constitution atached to it in the beginning and continued to attach to the District after the cession. The terms of the Constitution were over the District irre-

vocably. The cession of the District relinquished the authority of the States, but did not take it out of the United States. "Neither party had ever consented to that construction of the cession. If, before the District was set off, Congress had passed an unconstitutional act affecting its inhabitants it would have been void. If done after the District was created it would have been equally void." *Downes v. Bidwell*, 182 U. S. R., 244, 261.)

We can not believe that the relinquishment by the States to the United States of the 10 miles square for a permanent seat of government deprived Congress of the constitutional right to continue in the District some judicial tribunal which should have and exercise some part of the judicial power conferred by Article III.

We are not unmindful that the constitutional question considered is perhaps not necessarily involved in the determination of the issues presented, and that like all other courts we might well ignore the determination of anything which seems to be merely academic. But the parties have presented the case upon the theory that the proposition considered is in issue and have invited its determination; and as the question of constitutional construction underlies the whole case, we have viewed the proposition as not entirely in the abstract. Thus, we take the record as presented, inasmuch as without reference to our view of the matter the Supreme Court will deal with the issues on appeal in its own way.

The recovery of the amount of salary claimed presents a more serious question, notwithstanding the views announced respecting the character and tenure of the judges affected. The temporary character of the legislation from year to year in providing varying compensation and reserving or implying on the face of the annual appropriations for the payment of salaries the right to change the amount for another and subsequent fiscal year, and the failure in the one piece of permanent legislation to provide a higher salary beyond the year than that payable to the retired judge at the time of his resignation, creates the real difficulty.

The act of June 1, 1866 (14 Stats., 44), fixed the compensation of the chief justice at $4,500 per annum, and of the associate judges at $4,000 each from and after the passage of the act. Thereafter appropriations were made in the legislative, executive, and judicial appropriation acts for salaries as fixed by the act of 1866 for each fiscal year up to and including the fiscal year ending June 30, 1891. These appropriations provided for another associate justice, created by the act of June 21, 1870 (16 Stats., 160), and yet another associate justice authorized to be appointed by the act of February 25, 1879 (20 Stats., 320).

The appropriation act for the fiscal year ending June 30, 1892 (26 Stats., 908, 947), contains the following provision: "For salary of the chief justice of the supreme court of the District of Columbia and the five associate justices at the rate of five thousand dollars per annum each, thirty thousand dollars." The enacting clause of this act provided that the various sums appropriated were "in full compensa-

tion for the service" of that fiscal year; and section 4 of the same act provided "that all acts or parts of acts inconsistent or in conflict with the provisions of this act are hereby repealed." (*Ib.*, 948.)

15 The appropriation act for the fiscal year ending June 30, 1893 (27 Stat., 183, 223), provided "for salaries of the chief justice of the supreme court of the District of Columbia and the five associate judges, twenty-four thousand five hundred dollars." The enacting clause of this statute provided that the sum so appropriated was "in full compensation for the service" of the fiscal year; and the last section of the act provided "that all acts or parts of acts inconsistent or in conflict with the provisions of this act are hereby repealed" (*ib.*, 223). The sum so appropriated was the amount which had been fixed by law for the salaries of these six judges until the enactment of the appropriation act for the fiscal year ending June 30, 1892. Thus, during the fiscal year ending June 30, 1892, plaintiff's intestate was paid a salary at the rate of $5,000 a year, as provided by the appropriation act for that fiscal year. For the next succeeding fiscal year, ending June 30, 1893, he was paid a salary at the rate of $4,000 a year, as provided by the appropriation act for that year; and as he resigned from the bench on December 1 of the same fiscal year he was paid a salary at that rate until the time of his decease, pursuant to the provisions of section 714 of the Revised Statutes.

Under and act entitled "An act to establish a court of appeals for the District of Columbia," approved February 9, 1893, the salaries of the justices of the supreme court of the District of Columbia were increased to $5,000 each, payable quarterly if necessary. (27 Stats., 436.)

No provision for an increased amount of salary for judges who had retired was made by the act of February 9, 1893.

The legislative, executive, and judicial act for the fiscal year ending June 30, 1894, (27 Stats., 675, 714), appropriated "for salaries of the chief justice of the supreme court of the District of Columbia and the five associate judges, thirty thousand five hundred dollars. One-half of the foregoing amounts * * * shall be paid from the revenues of the District of Columbia." The enacting clause of this act likewise provided that this appropriation was made "in full compensation" for the service of the fiscal year, and the last section repealed all acts or parts of acts inconsistent or in conflict with any of its provisions.

The appropriation act for the fiscal year ending June 30, 1895 (28 Stats., 162, 204), also contained the like enacting clause and repealing section, and appropriated as provided in the act of June 30, 1894. Thereafter like appropriations were made annually in the same terms and amounts with like enacting clauses and repealing sections. The deficiency appropriation act of March 2, 1895 (28 Stats., 843, 851), contained a provision "to pay the chief justice and five associate justices of the supreme court of the District of Columbia the difference between the rate of compensation received by them

and five thousand dollars per annum for the fiscal year eighteen hundred and ninety-three, four thousand one hundred and fifty-five dollars and forty-seven cents, or as much thereof as may be necessary." Pursuant to this appropriation plaintiff's intestate was paid in April, 1895, the sum of $415.80 for that part of the fiscal year 1893 during which he held the commission of associate justice of the supreme court of the District of Columbia, and out of the remainder of the appropriation the chief justice and the other associate justices who held commissions during the whole of the year were paid sums which, when added to the salaries appropriated for them in the regular appropriation act for the year, amounted to $5,000 for the chief justice and $5,000 for each associate justice who was in office when claimant's decedent resigned and a proportionate amount was paid to his successor in office.

The appropriations for the fiscal year ending June 30, 1893—the year of Judge James's retirement—did not fix a definite salary beyond that year. The annual sums appropriated were couched in language indicating that Congress meant to keep control of the amount of salaries for judges of the supreme court of the District of Columbia from year to year. The phraseology employed to accomplish this end may or may not have been intended to avoid a constitutional objection to the diminution of salary after being permanently increased. But there was no such permanent increase of salary during the incumbency of the deceased judge as to entitle him to claim the compensation throughout his retirement given by the appropriation act for the fiscal year ending June 30, 1892. The 14th section of the act of February 9, 1893 (27 Stats., 436, *ante*), did not increase the salary which by law was payable at the time of the resignation, from which it follows that plaintiff is not entitled to recover. Accordingly, the petition must be dismissed.

16 VII.—*Judgment of the Court.*

No. 21959.

HARRIET T. JAMES, Adm'r of Charles P. James, Dec'd,
vs.
UNITED STATES.

At a Court of Claims held in the city of Washington on the 25th day of May 1903 judgment was entered in the above-entitled cause as follows:

The court on due consideration of the premises find for the defendants, and do order, adjudge and decree that the petition of Harriet T. James administratrix of Charles P. James deceased, be and the same is hereby dismissed.

BY THE COURT.

17 VIII.—*Application for and Allowance of Appeal.*

No. 21959.

HARRIET T. JAMES, Adm'r of Charles P. James, Dec'd,
vs.
UNITED STATES.

Comes now the above-named claimant, by her attorney, and moves the court to allow an appeal herein to the Supreme Court of the United States from the judgment in this case, entered May 25, 1903, dismissing claimant's petition.

A. A. HOEHLING, JR.
Attorney for Claimant.

Filed August 10, 1903.

MARCH 23, 1905.

Ordered that the appeal be allowed as prayed for.

BY THE COURT.

18 Court of Claims.

No. 21959.

HARRIET T. JAMES, Administratrix of Charles P. James, Deceased,
vs.
UNITED STATES.

I, John Randolph, assistant clerk of the Court of Claims certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact and conclusion of law filed by the court, of the opinion of the court, of the judgment of the court of the application for and allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 27th day of March 1905.

[Seal Court of Claims.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

Endorsed on cover: File No. 19,687. Court of Claims. Term No. 215. Harriet T. James, administratrix of Charles P. James, deceased, appellant, *vs.* The United States. Filed March 28th, 1905. File No. 19,687.

FILE COPY.

Supreme Court U. S.
FILED
MAR 5 1906
JAMES H. MCKENNEY,
Clerk

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 215.

HARRIET T. JAMES, ADMINISTRATRIX OF CHARLES P. JAMES, DECEASED, APPELLANT,

vs.

THE UNITED STATES OF AMERICA, APPELLEE.

MORGAN H. BEACH,
A. A. HOEHLING, JR.,
For Appellant.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 20553

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 215.

HARRIET T. JAMES, ADMINISTRATRIX OF CHARLES P. JAMES, DECEASED, APPELLANT,

vs.

THE UNITED STATES OF AMERICA, APPELLEE.

STATEMENT.

This is an appeal from the judgment of the Court of Claims dismissing the petition of the appellant, who sought to recover the difference between what was actually paid her intestate, during his retirement as an associate judge of the supreme court of the District of Columbia, and what was, as claimed by her, by law payable to him for that period. The claim was based on the act of April 10, 1869 (16 Stat., 45), being section 714, R. S. U. S., which is as follows:

> "When any judge of any court of the United States resigns his office after having held his commission as such at least ten years and having attained the age of seventy years, he shall during the residue of his natural life receive the same salary which was by law payable to him at the time of his resignation."

The facts found below were as follows:

First. Claimant is administratrix of Charles P. James, late a citizen of the United States and a resident of Washington, D. C., who departed this life August 9, 1899.

Second. Claimant's intestate was at one time an associate judge of the supreme court of the District of Columbia, which office he resigned December 1, 1892, after having held his commission more than ten years, and having attained the age of 74 years.

Third. His salary at the date of his appointment was $4,000 per annum, at which rate he was paid until July 1, 1891.

Fourth. From July 1, 1891, to June 30, 1892, his salary was $5,000 per annum, and from June 30, 1892, to December 1, 1892, he was paid at the same rate.

Fifth. On his retirement he was paid, during the residue of his natural life, at the rate of only $4,000 per annum.

Sixth. The period embraced in the claim herein is from December 1, 1892, to August 9, 1899, being six years, eight months, and eight days, at the rate of $1,000 per annum, aggregating the sum of $6,688.90.

On these findings of fact the court decided as conclusion of law that the petitioner could not recover and dismissed her petition, holding that while Judge James' salary had been increased during his continuance in office, and that while he was paid from the date of such increase for the residue of his active judicial service at the increased rate, such increase was but a temporary provision of law and not in force at the date of his resignation.

Assignment of Errors.

1. The court erred in holding that the salary which was by law payable to Judge James at the date of his resignation was four thousand dollars per annum.

2. The court erred in not holding that the salary which was by law payable to Judge James at the date of his resignation was five thousand dollars per annum.

3. The court erred in dismissing the petition of the appellant.

4. The court erred in not awarding judgment in appellant's favor for the sum of six thousand six hundred and eighty-eight dollars and ninety cents, being the difference between the amount actually paid him during the period of his retirement and the amount which was by law payable to him for that time.

ARGUMENT.

The single question in this case is, What was the salary which was by law payable to Judge James at the date of his resignation, December 1, 1892? It is not what amount of money had been appropriated for the payment of the judges of the court, but what was the sum which by law he was entitled to receive at that time, what was justly due him. Appellant contends that five thousand dollars per annum was the legal salary, while the Government insists that four thousand dollars was the correct amount. And appellant's propositions are (1) that Congress, by the act of March 3, 1891 (26 S. L., p. 947), intended to increase and actually did increase the salaries of the judges of the supreme court of the District of Columbia to five thousand dollars per annum each; (2) that Congress did not intend thereafter to diminish and did not diminish the salary thus increased by that act; and (3) that Congress could not thereafter constitutionally diminish the salary of any judge whose salary had been thus increased during his continuance in office.

If Congress did increase the salary in 1891, whether this were also the salary in 1892, may depend upon either the intention of Congress, as evidenced by all of its legislation on the subject, or the constitutional power of Congress to diminish a judicial compensation during the continuance of the judge in office. If Congress did not intend to diminish, it is unnecessary to inquire whether Congress had the constitutional power to diminish. But if Congress had not the constitutional power to diminish, that is a consideration in aid of ascertaining congressional intent, as well as a ground for positive relief against an intention unfavorable to appellant's claim for relief.

PROPOSITION .

Congress intended by the act of March 3, 1891 (26 S. L., p. 947), to increase and did actually increase the salary of the judges of the supreme court of the District of Columbia to five thousand dollars per annum each.

This act was the legislative, executive, and judicial appropriation act for the fiscal year ending on June 30, 1892, and uses the following language in making provision for the court of which Judge James was then a member:

> "For salaries of the chief justice of the supreme court of the District of Columbia and the five associate judges *at the rate of five thonsand dollars per annum each*, thirty thousand dollars."

For the preceding quarter of a century, since 1866, the salary of the chief justice had been $4,500 and of the associate judges $4,000 each per annum, and the stereotyped appropriation for salaries was simply to appropriate a gross sum, the aggregate amount of the salaries (*e. g.*, for salaries of the chief justice of the supreme court of the District of Columbia and the five associate judges, $24,500), leaving the

apportionment or the amount each should receive to the general law.

12 S. L., 693, 762; 13 S. L., 158, 457; 14 S. L., 55, 205, 455; 15 S. L., 109, 301; 16 S. L., 249, 493; 17 S. L., 81, 507; 18 S. L., 108, 369; 19 S. L., 168, 318; 20 S. L., 205; 21 S. L., 236, 412; 22 S. L., 254, 563; 23 S. L., 193, 452; 24 S. L., 208, 631; 25 S. L., 294, 744; 26 S. L., 267.

All of these acts simply appropriate a certain gross sum for the court, the division among the individual members being effected by the general act fixing the salary of each at a certain figure.

But in the act of March 3, 1891, the language used specifies the sum each is to receive, "at the rate of $5,000 per annum each."

By virtue of this enactment the salary of Judge James, theretofore $4,000 per annum, was increased to the sum of $5,000, and this amount he received.

Obviously, by this act more was done than to simply appropriate for the payment of a salary, the amount of which had been previously fixed.

Such, indeed, had been the sole function of all prior appropriation acts, every one of which from the creation of the court had the one object, and the only object, of appropriating a certain gross sum, the sum of all the salaries.

This 1891 act did more; it declared what each judge was to receive, in what amount each was to be paid, at what rate per annum, and appropriated the gross sum necessary for that purpose. It inserts, *ex industria*, the words "at the rate of $5,000 per annum each." Had they been omitted and the appropriation been simply of the gross amount, viz., $30,000, the question might have arisen whether this were not merely an overappropriation.

But with the insertion of these words, "at the rate of $5,000 per annum each," clearly the intention of Congress

was that each should be paid a salary of $5,000 per annum. That such was the intention was below, and probably here will be, admitted.

> "An appropriation act is *per se* nothing more than "the legislative authorization prescribed by the Con- "stitution that money may be paid out at the Treas- "ury. Frequently there is coupled with an appro- "priation a legislative indication that the designated "amount shall be paid to a person or class of persons, "and from such an appropriation a statutory right "arises upon which an action may be maintained. "Occasionally an appropriation act goes still further, "and expressly or by necessary implication changes "pre-existing law so as permanently to increase or "diminish the compensation of an officer, agent, or "employee of the Government."
>
> Campagna *vs.* U. S., 26 Ct. Cl., 317.

Proposition II.

Congress did not intend to diminish and did not diminish the salary fixed by the act of 1891.

In the appropriation act for the succeeding fiscal year Congress returned to the old form of expression, "for salaries of the chief justice of the supreme court of the District of Columbia and the five associate judges, twenty-four thousand five hundred dollars."

Act July 16, 1892 (27 S. L., 223).

In the enacting clause of this act, as of its predecessor, it was provided that the various sums appropriated were "in full compensation for the service" of that fiscal year; and in its concluding clause, as in that of its predecessor, it was provided "that all acts or parts of acts inconsistent or in conflict with the provisions of this act are hereby repealed." These forms of enacting and repealing clauses are common to all appropriation acts of this character.

By an act of February 9, 1893 (27 S. L., 434), taking effect April 3, 1893, Congress created a Court of Appeals for the District of Columbia. Its effect on the supreme court of the District of Columbia was to relieve the latter of a very considerable portion of its labor, the review in general term by two or more judges of proceedings in special term before a single judge, and this act, in section 14 provided that "the justices of the supreme court of the District of Columbia shall hereafter receive an annual salary of five thousand dollars."

This act, it will be observed, was passed in the same fiscal year in which Judge James resigned and about two months after his resignation. At the time of its passage the appropriation act of July 16, 1892, was in force, and there was by it no provision made for the payment of the salaries of the judges of the supreme court of the District of Columbia required by the Court of Appeals act. Congress, therefore, in an act of March 3, 1893 (27 S. L., 653), appropriated an additional amount of $2,000 for salaries of these judges from the date when the Court of Appeals act became effective, April 3, 1893, to the end of the then fiscal year, July 1, 1893.

Finally, by an act of March 2, 1895 (28 S. L., 851), Congress, in an act "to supply deficiencies in the appropriations for the fiscal year ending June 30, 1893, and for prior years," appropriated "to pay the chief justice and five associate justices of the supreme court of the District of Columbia the difference between the rate of compensation received by them and five thousand dollars per annum for the fiscal year eighteen hundred and ninety-three."

It will be argued for Government that Congress intended by the act of 1892, *supra*, to reduce the salary for the then fiscal year to what it had been prior to the act of March 31, 1891, because it appropriated "in full compensation for the service" of that year and repealed any inconsistent or conflicting act. It may be urged, also, that such intention on the part of Congress is strengthened

by the fact that in the Court of Appeals act of February 9, 1893, it was provided that the judges should thereafter receive a salary of $5,000, and that in the act of March 3, 1893, *supra*, appropriation was made to pay the judges at this rate only from April 3, 1893, to July 1, 1893.

The error of this argument lies in the assumption that the act of 1891 was repealed by that of 1892, and the re-enforcement from the prospective operation of the Court of Appeals act and from the appropriation of the act of March 3, 1893, is weakened when the act of March 2, 1895, is considered. Why should Congress in this last act appropriate to pay the difference between the rate of compensation received by the judges in the fiscal year 1893 and five thousand dollars per annum? Was it a gift or the payment of a debt? Did Congress raise the salary in 1891 for a year, reduce it in 1892 for ten months of the fiscal year, raise it again for the remaining two months, and, contemporaneously with the last increase, lighten the court of much of its labor by creating a new court? And did Congress three years later repent of its capriciousness and make a present to the judges with whose compensation it had juggled? Such experimentation is not to be imputed to Congress if there be a fair theory of consistent action deducible from any possible principles of construction.

Appellant submits, therefore, that the act of 1891 is not repealed, in so far as it increases the salary to five thousand dollars *per annum*, by the act of 1892, which simply appropriates a sum insufficient for the payment of that amount; that the provision of the Court of Appeals act must be held declaratory of what the judges of the supreme court of the District of Columbia were to receive when the new and additional court came into existence, and that the act of March 2, 1895, was of the well-recognized class of general deficiency acts whose expressed function it is to supply deficiencies in appropriations not only for the next preceding fiscal year, but "for prior years," and that it was a payment, though

a belated payment, of the amounts which were payable by law at the time of Judge James' resignation.

Let it be remembered that the act of 1891 had two objects—effected two results; one was to raise the salary to $5,000, the other to authorize its payment for the ensuing fiscal year. It concluded with the usual clause repealing all inconsistent or conflicting acts or parts of acts.

Any act or any part of an act, therefore, which was in conflict or inconsistent with a judicial salary of $5,000 per annum was inoperative and repealed. There could not be at one and the same time an act giving a $4,000 salary and an act giving a $5,000 salary without a conflict or inconsistency, so that the act of June 1, 1866, which originally fixed the lesser sum, was repealed.

The general act of 1866 being repealed, it could only be revived by being re-enacted or by a repeal of the act of 1891, which had repealed it. Admittedly it was not revived by any specific re-enactment; wherefore it is necessary to consider how far the act of 1891 was repealed.

If repealed at all, it was by the act of 1892, but any repeal by that act must be an implied repeal. It must be an implied repeal, because there is no express repeal of any act. Any act inconsistent or in conflict with it would be construed to be repealed, independently of the formal concluding clause of repeal. For a statute to say that any prior statute inconsistent or in conflict with it is to be repealed, expressly repeals nothing and is supererogatory. The question of inconsistency or conflict is one of construction.

Now, the act of 1892 authorized the payment from the Treasury of the United States of a definite sum of money—$24,500. It said nothing as to the rate of compensation. It was nothing more than the legislative authorization prescribed by the Constitution that money be paid out at the Treasury. In the case of the permanent officers, whose salaries are appropriated for in the legislative, executive, and judicial appropriation acts, the amount or rate of salary is

usually fixed by a general law, not by the act itself. The ordinary purpose of the act is to appropriate, to set apart so much as is necessary for certain fixed charges previously ascertained, not to determine or ascertain the amount or rate of charge.

But in this lies the peculiarity of the act of 1891; it fixed the rate and appropriated for its payment. It had two purposes—to raise the salary and to appropriate money to pay it.

Now, the act of 1892 simply appropriates; it does not in terms, at least, declare what the salary is. It appropriates for salaries, but is silent as to the rate or amount. It professes in its enacting clause to be a complete appropriation for the service of the fiscal year, but it appropriates as if the amount had been already fixed. It can hardly be said, therefore, to have had the twofold purpose of the act of 1891.

There is nothing inconsistent in a law fixing the amount of a salary and an appropriation of a sum less than this amount. There is nothing inconsistent in a law fixing a salary and a total failure to appropriate for its payment. A failure today for any cause on the part of Congress to make appropriation for the payment of the salaries of permanent legislative, executive, and judicial officers of the Government would not, in law, either abolish the officers or extinguish their right to be paid. If, therefore, there be no necessary legal inconsistency between an act fixing a salary at a certain sum, and an act appropriating a less sum, the two may, in a legal sense, coexist. So that to work a repeal of the act of 1891 of the substantive feature of a general salary, by the act of 1892, it must appear that the act of 1892 contemplated and covered the same ground, had the same twofold object, and made different, inconsistent, and conflicting provisions.

It is claimed, by Government, to do this by the use of the words in the enacting clause "in full compensation" for the service of the fiscal year. If the appropriation, it is argued,

is expressed by Congress to be in full compensation, then, by the ruling of this court in U. S. *vs.* Fisher, 109 U. S., 143, the intention to reduce is conclusively established.

Unquestionably this court decided in Fisher's case that, Congress having appropriated, in full compensation for the service of a territorial judge for a fiscal year, an amount less than the salary fixed by an earlier general act, the earlier act was suspended, and the smaller sum was all that the claimant could have. The reason given was that when Congress said the smaller sum appropriated should be in full compensation, the court had no power to say that it should not be in full compensation. There was, in the view of the court, no ambiquity and no room for construction; and to emphasize this the decision in U. S. *vs.* Langston, 118 U. S., 389, was made to turn on the absence of the words "in full compensation." There this court held that when Congress appropriated for particular fiscal years a less amount for the minister resident at Haiti than the salary fixed, without limitation as to time, by an earlier general act, the minister would be entitled to and could recover, for those particular years, the larger salary fixed by the earlier act. This court distinguished the case from Fisher's case by the absence from the appropriation acts affecting Langston of the words "in full compensation," which were contained in the acts under consideration in Fisher's case.

But the case at bar is distinguishable from both of these cases, in that Congress has, by the act of 1895, *supra*, conclusively shown that the appropriation of 1892 was not "in full compensation."

All appropriation acts for executive, legislative, and judicial expenses, for a quarter of a century at least, purport to appropriate "in full compensation for the service of the fiscal year," yet to every one, it is believed, there is the invariable sequence of an act appropriating for deficiencies.

An act to supply deficiencies in the appropriation for the next preceding fiscal year and for prior years, is as fixed an

event of congressional practice as the general appropriation act, whose deficiencies are supplied against its declaration that it intends to appropriate in full compensation for the service of the ensuing year.

The principle of construction, properly invoked here, is that—

> "if it can be gathered from a subsequent statute *in pari materia* what meaning the legislature attached to the words of a former statute, this will amount to a legislative declaration of its meaning and will govern the construction of the first statute."
>
> U. S. *vs.* Freeman, 3 How., 565.

In determining the intention of Congress every act may be examined. The act of March 3, 1891, which raised the salary to $5,000, was in line with a general increase of judicial salaries of inferior courts, as is evidenced by the fact that a few days prior to its passage, Congress had increased the salary of every district judge of the United States to the same amount (act Feb'y 24, 1891, 26 S. L., 783).

There has never been an instance of reduction of judicial salary in the District of Columbia from its creation, as the permanent seat of Government, to the present time, unless the short-lived and changeable policy of the act of 1892, disclaimed by Congress in the act of 1895, is to be construed as being an unreasonable and inexplicable exception.

Proposition III.

Congress could not, after increasing the salary of Judge James, diminish it during his continuance in office.

It is now to be submitted that if this court should hold that the increase of the act of 1891 was not intended as a permanent increase of salary it was, nevertheless, not within the power of Congress, after increasing it for one year, to

diminish it thereafter. The ground of this contention is that Judge James was protected by the constitutional guaranty of judicial independence. This may be met by the rejoinder (*a*) that to reduce a judicial salary to the amount which it was when the judge took office is not a diminution in the sense of the Constitution, or (*b*) it may be contended that the supreme court of the District of Columbia is not one of the courts contemplated by the first section of the third article.

It is proposed to consider these objections in their order.

(*a*) The constitutional provision is:

> * * * "The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office."
>
> Const., art. III, sec. 1.

To receive at stated times a compensation is to be regularly paid.

To receive at stated times a compensation which shall not be diminished, is to be regularly paid and to be protected against any reduction of pay.

A compensation is diminished when it is made less than it is, though equal to what it may have once been.

If my salary be now five thousand dollars per annum and my employer tells me that next year it will be but four thousand dollars, it is none the less a diminution of my salary, though he justify his economy by the fact that it was some years ago but four thousand dollars.

Diminution is the making something less than it is, less than what it has grown to be.

After diminution, that which has been diminished may be equal to what it at some earlier time had been, but it has been diminished.

In all, or nearly all of the plans proposed in the conven-

tion, there was a prohibition against increase, as well as diminution.

Elliott's Debates, 1 ed., vol. 1, pp. 149, 176, 182.

Said Mr. Madison:

> "I wished myself to insert a restraint on the augmentation as well as the diminution of their compensation, and supported it in the convention. But I was overruled. I must state the reasons which were urged. They had great weight."
>
> Elliott's Debates, Virginia, vol. 3, p. 537.

The prohibition against increase was rejected.

The power to increase is allowed; it impliedly exists. A sum at one time sufficient, later might be inadequate. The amount, initial or subsequent, is left to Congress; but it must be regularly paid, and there must be no diminution during continuance in office.

In Commonwealth *ex rel.* Hepburn *vs.* Mann, 5 Watts & Serg., 403, the case was thus: Hepburn was appointed president judge of the ninth judicial circuit of Pennsylvania March 5, 1839, when the salary was $1,600. By an act of July 19, 1839, the salary was increased to $2,000. By an act of January 14, 1843, the act of July 19, 1839, was repealed. Hepburn, as relator, brought *mandamus* against Mann, State treasurer, for payment of salary at the greater rate, and the repeal, *inter alia*, was set up by Mann in his answer, to which the relator demurred. The constitutional provision of Pennsylvania was "the judges of the supreme court and the presidents of the several courts of common pleas shall, at stated times, receive for their services an adequate compensation to be fixed by law, which shall not be diminished during their continuance in office."

Note that when the respondent took office the salary was $1,600; that it was increased to $2,000; that it was then reduced to the original $1,600. The constitutionality of this reduction was squarely presented to the court and by it held

to be violative of the provision cited, *mandamus* being made peremptory. The distinction was sought to be drawn between a reduction of initial salary and a reduction of a subsequently increased salary to the initial amount. The opinion was that the same reasons, which are the familiar ones for judicial independence under the Federal Constitution, applied with equal force to either reduction.

It was suggested, too, that the power to increase might be abused for legislative favorites, which subsequent legislatures could not correct if they were without power to reduce the increased to the original amount. To this the court say:

> "But this was an evil, if it be one, which must have been foreseen, and it appears did not alarm the convention, nor has subsequent experience evinced the necessity of any such precaution; and at any rate, they were too wise to attempt to avoid a contingent evil which from the nature of things would not often happen, by running into another, in their estimation at least, of such transcendent importance and magnitude, jeopardizing the independence and integrity of a co-ordinate branch of the Government. It must readily occur, on the slightest reflection, that if the convention intended to give the clause in question the limited signification contended for, how easy it would have been to put that intention beyond the reach of doubt or cavil, by a slight alteration of the language used. By superadding a few words even, which would not have destroyed the beauty of the language, all difficulty would have been effectually prevented. But we cannot attribute this intention to those great men on a doubtful inference, inasmuch as in our judgment it would materially impair, if not totally destroy the value of the provision itself. It would be suicidal to the object so steadily kept in view by the framers of the Constitution."

(*b.*) Finally, it is submitted that the Supreme Court of the District of Columbia is an inferior court of the United States,

within the meaning of the Constitution, in the sense that the compensation of one of its judges cannot be diminished during his continuance in office.

It was created by the act of March 3, 1863 (12 S. L., p. 762). By the third section of that act the court and the judges thereof possessed the same powers and exercised the same jurisdiction as were possessed and exercised by the circuit court of the District of Columbia.

The circuit court of the District of Columbia was created by the act of February 27, 1801 (2 S. L., 103), consisted of a chief and two assistant judges, and the court and the judges thereof had all the powers vested by law in the circuit courts and the judges of the circuit courts of the United States.

At the date of the passage of the act of February 27, 1801, the law which vested the powers in the circuit courts of the United States was the act of February 13, 1801 (2 S. L., 89), by the eleventh section of which the jurisdiction conferred is as follows:

> "Cognizance of all crimes and offenses cognizant under the authority of the United States and committed within their respective districts or upon the high seas; and also of all cases in law or equity, arising under the Constitution and laws of the United States, and treaties made, or which shall be made under their authority; and also of all actions or suits of a civil nature, at common law, or in equity, where the United States shall be plaintiffs or complainants; and also of all seizures on land or water and all penalties or forfeitures made, arising or accruing under the laws of the United States; which cognizance of all penalties and forfeitures shall be exclusively of the State courts in the said circuit courts, where the offenses by which the penalty or forfeiture is incurred shall have been committed within fifty miles of the place of holding the said courts; *and also of all actions or suits, matters or things cognizable by the judiciary authority of the United States under and by virtue of the Constitution thereof,*" *etc.*

In the case of Kendall *vs.* The United States (12 Pet., 524), which came to this court on writ of error from the circuit court of the District, Mr. Justice Thompson, in delivering the opinion of the court, speaks of the lower court as the circuit court of the United States for the District of Columbia, and in the course of his opinion considers the powers and jurisdiction of that court. The main question involved in that case was whether the circuit court of the District of Columbia had power to issue a writ of *mandamus* against the Postmaster General. The court had been considering earlier cases of *mandamus* in which the writ had been refused, but the court held that this was because the power to issue the writ had not been communicated by law to the circuit courts of the United States; that it was a dormant power not yet called into action and vested in those courts, and then Mr. Justice Thompson in speaking for the court, goes on to say:

> "It must be admitted, under the doctrine of this court in the cases referred to, that unless the circuit court of this District is vested with broader powers and jurisdiction in this respect than is vested in the circuit courts of the United States in the several States, then the *mandamus* in the present case was issued without authority. But in considering this question it must be borne in mind that the only ground upon which the court placed its decision was that the constitutional judicial powers on this subject had not been imparted to those courts. * * * But let us examine the act of Congress of the 27th of February, 1801, concerning the District of Columbia, and by which the circuit court is organized, and its powers and jurisdiction pointed out. And it is proper preliminarily to remark, that under the Constitution of the United States, and the cessions made by the States of Virginia and Maryland, the exercise of exclusive legislation in all cases whatsoever is given to Congress. And it is a sound principle that in every well organized government the judicial power should be co-extensive with the legislative, so far at least as private rights are to be

enforced by judicial proceedings. There is in this District no division of powers between the general and State governments. Congress has the entire control over the District for every purpose of government; and it is reasonable to suppose that, in organizing a judicial department here, all judicial power necessary for the purposes of government would be vested in the courts of justice. The circuit court here is the highest court of original jurisdiction; and if the power to issue a *mandamus* in a case like the present exists in any court, it is vested in that court. * * * Thus far the power of the circuit court to issue the writ of *mandamas*, has been considered as derived under the 1st section of the act of February 27th, 1801. But the 3d and 5th sections are to be taken into consideration in deciding this question. The 3d section, so far as it relates to the present inquiry, declares 'that there shall be a court in this District which shall be called the circuit court of the District of Columbia; and the said court and the judges thereof shall have all the powers by law vested in the circuit court and the judges of the circuit courts of the United States.' And the 5th section declares 'that the said courts shall have cognizance of all cases in law and equity between parties, both or either of which shall be resident or be found within the District.' Some criticisms have been made at the bar between the use of the terms power and cognizance as employed in those sections. It is not perceived how such distinction, if any exists, can affect the construction of this law. * * * Power must include jurisdiction, which is generally used in the exercise of that power in courts of justice. But power as used in the Constitution would seem to embrace both. * * * And the power in the court below to exercise this jurisdiction, we think, results irresistibly from the third section of the act of the 27th of February, 1801, which declares that the said court and the judges thereof, shall have all the powers by law vested in the circuit courts, and the judges of the circuit courts of the United States. The question here is what circuit courts are referred to.

By the act of the 13th of February, 1801, the circuit courts established under the Judiciary Act of 1789, were abolished; and no other circuit courts were in existence except those established by the act of the 13th of February, 1801. * * * The reference is to the powers of law vested in the circuit courts. The question necessarily arises, what law? The question admits of no other answer than that it must be some existing law by which powers are vested and not a law which had been repealed. And there was no other law in force vesting powers in circuit courts, except the law of the 13th of February, 1801. And the repeal of this law fifteen months afterwards, and after the court of this District had been organized and gone into operation, under the act of 27th of February, 1801, could not, in any manner, affect that law any further than was provided by the repealing act. To what law was the circuit court of this District to look for the powers vested in the circuit courts of the United States, by which the court was to be governed during the time the act of the 13th of February was in force? Certainly to none other than that act. And whether the time was longer or shorter before that law was repealed, could make no difference." Kendall *vs.* U. S. *supra.*

This decision expressly says that authority to issue a writ of *mandamus* to an officer of the United States is within the scope of the judicial powers of the United States under the Constitution. The question clearly was whether that power had been communicated to the circuit courts or whether, as to them, it was a dormant power, not yet called into action and not yet vested in those courts.

Then the court reasons that, unless the circuit court of the District of Columbia were vested with broader powers and jurisdiction than the circuit courts of the United States, that court in like manner would have no authority to issue the writ.

The significance of this decision, in its application to the case at bar, is that it finds in the circuit court of the District

of Columbia not only the same powers as were possessed by the circuit courts of the United States, but also an additional and further power which is within the scope of the judicial power of the United States under the Constitution. That is to say, the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as Congress may, from time to time, ordain and establish. The judicial power shall extend to certain subjects; it may be communicated to certain courts, or it may be a dormant power not yet called into action. It has been communicated, it is an awakened power, it is called into action in the circuit court of the District of Columbia.

It is pertinent to note that in the 21st section of the act of February 13, 1801, a new district was established in Maryland and Virginia, which included the District of Columbia, and was called the district of Potomac, for which a district court was to be held at Alexandria by the district judge of the district of Maryland.

And by the 7th section of an act of March 3, 1801 (2 S. L., p. 124), it was provided that the chief judge of the District of Columbia should hold the district court of the United States in and for the district of Potomac, and should have all the powers and duties then had by the district judges of the United States within their respective districts.

So, then, it appears that there was at this early day in the District of Columbia a separate circuit court for that District, having not only the judicial powers vested in the then existing circuit courts of the United States, but even greater powers, which it would have been competent for Congress to have vested in the circuit courts of the United States under the Constitution, but which Congress had not seen fit to do. The act of February 13, 1801, was repealed by the act of April 29, 1802 (2 S. L., p. 132), but this repeal had no effect whatever on the act of February 24, 1801, which created the circuit court for the District of Columbia.

Kendall *vs.* United States, *supra*.

It is well known that one of the first points of attack by the incoming Jefferson administration was this very judiciary act of February 13, 1801, passed in the last days of Mr. Adams' administration, but the manner in which the circuit court of the District of Columbia obtained its jurisdiction, viz., by reference to the act of 1801, saved the jurisdiction of this court.

It is hardly necessary here to trace further the history of legislation affecting the judiciary in the District of Columbia during the period between the act of February 13, 1801, and the act of March 3, 1863, for the present purpose is simply to show that the old circuit court of the District of Columbia was made a depository of a part of the judicial power of the United States, mentioned in the Constitution. There was a separate criminal court, a separate orphans' court, sundry justices of the peace, all existing under acts of Congress; but the significant fact is that the circuit court of the District of Columbia, as the predecessor of the supreme court of the District of Columbia, had jurisdiction and power invested in it under the Constitution, which descended upon the supreme court of the District of Columbia.

It is undoubtedly true that the old circuit court was abolished by the act of March 3, 1863, which was a civil war act. The existence of the circuit court of the District of Columbia as a constitutional court was not then seriously questioned, but reorganization was urged, because it was alleged to be a judicial patchwork of sixty years. To this it was replied by the advocates of the then existing system that it might be reorganized without turning out the judges; that an additional judge might be created if the number were insufficient; that the incumbents could only be removed by impeachment. But to this the rejoinder was made by those who desired the overthrow of the court, that the power which could create could destroy, and that as to the three judges then in office one of them was superannuated

another was suspected of secession sympathies, and the third might be appointed to the new court!

Congressional Globe, February 18–20, March 3, 1863.

It is to be remembered that judges of the courts in the District of Columbia have always held office during good behavior, that all the acts creating them so specify their tenure to be, and the Supreme Court of the United States has always exercised appellate jurisdiction over them. So that the real question at this stage of the case is, what is the test of a constitutional court? Given a court in which is vested any of the judicial power of the United States, ordained and established by Congress, inferior to the Supreme Court of the United States, with judges who hold their office during good behavior, is this or not a court protected by the Constitution?

Is the test to be made by locality? Is it to be determined by the place in which the court sits? If it sits in the confines of a State is it constitutional, if in the limits of the District of Columbia, is it not constitutional?

As a question of constitutional power all the inferior courts of the United States for the several States, except in criminal prosecutions, might be held in the District of Columbia itself. It would be inconvenient to the point of revolution, but the power exists.

Must a court to be constitutional have some or all, but only some or all of the jurisdictional subjects to which the judicial power of the United States under the Constitution extends? No; but it must have only those subjects of jurisdiction which can constitutionally be given to it.

The court in the District of Columbia is none the less constitutional because it has a broader jurisdiction than a Federal court in the States.

It has a broader jurisdiction here because it is the resultant of two constitutional powers, one "to constitute tribunals

inferior to the Supreme Court;" another "to exercise exclusive legislation over such District."

Exclusive legislation does not mean absolute legislation. It does not imply subordination of the judicial to the legislative power. The Constitution is in force in the District of Columbia. Its threefold division of power is here. Before the District of Columbia was created its component parts were under Federal judiciary and State judiciary. After it was created Federal and State judiciary were merged into one tribunal.

Instead of two tribunals, one passing on questions which might be called National or Federal, the other, on those analogous to State or municipal concerns, the whole jurisdiction was put in one court, and constitutionally put in one court.

There is no analogy, or at least a not very controlling one, between the courts created by Congress in the Territories and the courts of the District of Columbia.

Territory implies, *ex vi termini*, a temporary condition; the seat of government implies permanency.

A Territory is governed by one clause of the Constitution; the seat of government under another. The very purposes and condition of the cession by Maryland and Virginia to the United States, and the acceptance of the ceded land by the United States, was the *permanency* of the seat of government.

Territory means inchoate statehood; with the seat of government statehood is a thing of the past.

Territory is the result of war, of treaties, of cession by other sovereignties; the seat of government came in the way expressly marked out by the Constitution from the bodies of two of the States.

> "This District has been a part of the States of Maryland and Virginia. It has been subject to the Constitution and was a part of the United States. The Constitution had attached to it irrevocably.

There are steps which can never be taken backward. The tie that bound the States of Maryland and Virginia to the Constitution could not be dissolved without, at least, the consent of the Federal and State Governments to a formal separation. The mere cession of the District of Columbia to the Federal Government relinquished the authority of the States, but it did not take it out of the United States or from under the ægis of the Constitution. Neither party had ever consented to that construction of the cession. If, before the District was set off, Congress had passed an unconstitutional act, affecting its inhabitants, it would have been void. If done after the District was created, it would have been equally void; in other words, Congress could not do indirectly by carving out the District what it could not do directly. The District still remained a part of the United States, protected by the Constitution. Indeed, it would have been a fanciful construction to hold that territory, which had been once a part of the United States, ceased to be such by being ceded directly to the Federal Government."

Downes *vs.* Bidwell, 182 U. S., 260.

The District of Columbia is within the meaning of the uniformity clause, and the right of Congress to tax the District does not depend solely on the grant of exclusive jurisdiction.

Loughborough *vs.* Blake, 5 Wheat., 317.

The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within the District as elsewhere within the United States.

Act Feb. 21, 1871, 34 S. L., p. 426.

A judgment of the supreme court of the District of Columbia is a judgment of a court of the United States. The faith and credit to be given it is not under article 4, section 1, of the Constitution, which is applicable to judgments

of the State courts, but "by other provisions of the Constitution, such as those which declare the extent of the judicial power of the United States, which authorize all legislation necessary and proper for executing the powers vested by the Constitution in the Government of the United States, or in any department or officer thereof, and which declare the supremacy of the authority of the National Government within the limits of the Constitution."

Embry *vs.* Palmer, 107 U. S., 3.

A general law of the United States (sec. 858, R. S.) in relation to competency of witnesses in the courts of the United States is applicable to the courts of the District of Columbia, and this is true, although a law on the same subject specially applicable to the District existed at the same time.

Page *vs.* Burnstine, 102 U. S., 664.

Yet this general law, though held applicable to the District of Columbia, was held inapplicable in the Territories.

Good *vs.* Martin, 95 U. S., 90.

The District of Columbia is within the meaning of section 1014 of the Revised Statutes, providing the method of arrest and the removal of a person charged with an offense against the United States from the district in which he may be found to the district wherein the offense is alleged to have been committed.

Benson *vs.* Henkel, 198 U. S., 1.

The case of American Insurance Co. *vs.* Canter, 1 Pet., 511, turned upon the point whether cases in admiralty and cases arising under the laws and Constitution of the United States were identical; and Chief Justice Marshall, in speaking for the court, held that they were not. In enforcing this view it is that, he says, "they are legislative courts, created in virtue of the general right of sovereignty which exists in the

Government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States." The fact that the judges held office for four years is stated as conclusively showing that they were not created under the constitutional clause, according to which judges must have life tenure, and that the jurisdiction with which they were invested was not a part of the judicial power defined in the third section of the Constitution. Nowhere is it said that Congress could not have created a constitutional court in the Territories; all that is decided is that Congress had not done so.

If the judicial tenure fixed by Congress is decisive, then the courts of the District of Columbia, whose judges have ever held during behavior, are constitutional and not legislative.

It is submitted that the judgment below should be reversed.

MORGAN H. BEACH,
A. A. HOEHLING, JR.,
For Appellant.

WASHINGTON, D. C., *March* 3, 1906.

FILE COPY.

Office Supreme Court U. S.
FILED
APR 9 1906
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 215.

HARRIET T. JAMES, ADMINISTRATRIX OF CHARLES P. JAMES, DECEASED, APPELLANT,

vs.

THE UNITED STATES OF AMERICA, APPELLEE.

REPLY BRIEF OF MR. BEACH TO THE BRIEF OF THE GOVERNMENT.

MORGAN H. BEACH,
Of Counsel for Appellant.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 21082

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 215.

HARRIET T. JAMES, ADMINISTRATRIX OF CHARLES P. JAMES, DECEASED, APPELLANT,

vs.

THE UNITED STATES OF AMERICA, APPELLEE.

Reply Brief of Mr. Beach to the Brief of the Government.

Appellant's brief was filed March 5 and the case called for argument March 12. The Government then asked further time, and, over appellant's objection, this was granted, the case being reassigned for argument on Monday, April 2. The Government's brief was filed April 4.

I.

Though having had the appellant's brief under consideration for thirty days, the Government, by a sort of *coup de main*, meets no one of appellant's propositions, but bases its entire contention on the assertion that section 714 did not apply to the court of which Judge James was a member.

True it is that, in developing this argument, the Government touches upon the character of that court as constitu-

tional or legislative; but this is done simply to enforce the main proposition, that section 714 can be availed of only by a judge of the Supreme Court of the United States or of one of the inferior courts ordained and established by Congress under the authority of the first section of the third article of the Constitution.

If the Government stakes the issue in this case on this interpretation of section 714, it raises a simple question of statutory construction, the solution of which is easily and clearly made against the Government's position.

Section 714 has only to be read to show how clearly it runs in favor of any judge of any court of the United States who can comply with its conditions.

It was for the benefit of any judge of any court of the United States who had held his commission as such for ten years and had passed the age of three score and ten.

The sole limitation upon courts of the United States that is involved is that they must be courts whose judges could hold their commisions ten years.

Clearly, therefore, it applies to all courts of the United States whose judges hold their commissions during good behavior and not for a limited term of years.

An elaborate and, it would seem, an entirely unnecessary attempt has been made by the Government to trace the legislative history of the passage of the act which, upon the revision, became section 714.

Such research is, even where there is any ambiguity and where the intention is in doubt, a poor method, at best, of ascertaining legislative intent.

And where, as here, there is no ambiguity and no room for construction, further to quote portions of the debate attending the passage of the bill is to do that which is not only useless, but which is directly violative of the canons of this court. In the Trans-Missouri Freight Association case (166 U. S., page 318) this court refers to the general acquiescence in the doctrine that debates in Congress are not appropriate

sources of information from which to discover the meaning of the language of a statute passed by that body.

"The reason is that it is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other; the result being that the only proper way to construe a legislative act is from the language used in the act and, upon occasion, by resort to the history of the times when it was passed."

Moreover, the administrative interpretation of section 714 in the present case and in the case of several other retired justices of the supreme court of the District of Columbia, living and dead, runs directly counter to this fantastic theory of the Government.

The late Judge Wylie enjoyed the benefit of this section for more than twenty years; Judge Cox for a somewhat shorter time. Now living retired under this act are Chief Justice Edward F. Bingham and Judge Alexander B. Hagner, while from the Court of Appeals of the District of Columbia, Mr. Chief Justice Alvey and Mr. Associate Justice Morris have recently availed themselves of its provisions.

Indeed, proper confidence in the strength of this position should have compelled Government below to have set off the amount actually paid Judge James in his lifetime against the administratrix, and the same theory must drive Government to reclamation from the other retired judges, or their estates, of the moneys thus improvidently and prodigally paid them.

If the supreme court of the District of Columbia be, in any sense, a court of the United States (and this court has held it so to be in Embry *vs.* Palmer), and if the Revised Statutes must be treated as a legislative declaration by Congress of the statute law on the subjects which they embrace (as this court held in U. S. *vs.* Bowen, 100 U. S., 508), the original act from which section 714 was taken cannot even be referred to.

It requires more ingenuity to raise any ambiguity in the section than to answer it.

II.

The Government next (p. 10) is at some pains to inform this court that the District of Columbia was, in the act establishing the temporary and permanent seat of Government, indifferently styled district or territory; but, lest this court might be misled by the announcement of this well-known fact or might mistake sound for substance, there is a frank disclaimer of any reliance by the Government "upon any argument based upon nomenclature." Yet so attractive seems this line of composition that several pages of citation follow, from which it appears that the word "territory" once again occurred in another act and once was actually used in an opinion of this court! From all of which the conclusion of the Government is that "whether we call the seat of Government a district or a territory is not material to the present case" (p. 16).

III.

The Government (p. 22) is not "aware that the political status of the courts of the District of Columbia has ever been directly judicially decided;" but the Government also thinks "the case of United States *vs.* Dana *et al.* (Fed. Rep., vol. 68, p. 886), which originated in the United States district court for the southern district of New York, comes nearer to deciding the principle of the judicial distinction between the courts of the District of Columbia and the courts of the United States than any other recent decision that we know of."

It is not immediately apparent just what is meant by the "political status" of a court, whether in the District of Columbia or elsewhere in the United States, nor is light afforded by citing a case which "comes nearer to deciding the prin-

ciple of the judicial distinction between" a court there and somewhere else in the United States.

Presumably the thought concealed in this language is that no court has decided in what respect the supreme court of the District of Columbia differs from any other Federal court, and that the Dana case, in the opinion of the Government, will greatly aid this court in reaching a proper conclusion.

But the trouble with the Dana case and its inutility at this juncture is that this court has already overruled it in Benson *vs.* Henkel, 198 U. S., 1.

The writer has had recent and frequent occasion to examine the Dana case, and has been obliged to assail it in the very district in which it was decided and where it has been held in reverent esteem by sundry committing magistrates as a binding rule of conduct in proceedings for removal under section 1014.

The underlying and controlling principle of that case is, as will be seen on a careful reading of it, that the District of Columbia is not a district within the meaning of section 1014, while this court in Benson *vs.* Henkel, *supra*, has decided that the District of Columbia is such a district within the purview of that section.

Judge Brown's reasoning in the Dana case was, in effect, this:

Section 1014 was originally section 33 of the original judiciary act; the original judiciary act only contemplated removal from one Federal district in a State to another Federal district in the same or another State; the only change of section 33, to make section 1014 of the Revised Statutes, was to alter the words of the former "by this act" to the words "by law" in the latter. This, holds Judge Brown, changed not the view point of the fathers; and the mental purpose of the revisers was by him held to be exactly the same as that of the first Congress, neither having the District of Columbia in mind. It is interesting to note that one of the authorities he cites for this identity of meaning of the original act with

section 1014, R. S., is cited by this court as the ground for an exactly opposite conclusion—U. S. *vs.* Bowen, 100 U. S. 508.

IV.

After stating that no direct decision on the "political status" of the supreme court of the District of Columbia can be found, it is asserted (p. 44), with much rhetorical emphasis, that this court has decided it to be impossible "that a court of the United States can be established under article III, section 1, somewhere else than in one of the United States." "Any logician, if a lawyer," who should gainsay this or who should attempt to distinguish between the power of Congress over the Territories and in the District of Columbia is consigned to the limbo of appellant's counsel.

But in the brief of Government below occurred the statement that the United States Court of Claims is established under article III, section 1; and the language of Mr. Chief Justice Chase in Klein *vs.* United States, 13 Wall., 128, was then cited to show that it was one "of those inferior courts which Congress authorizes."

And if distinction be desired between the power of Congress in the Territories and in the District of Columbia, the Government should at least quote the Constitution correctly. The latter power is not, as is surprisingly stated at page 44 of the Government's brief, the power "to exercise exclusive *jurisdiction*," but the power "to exercise exclusive *legislation*."

This might be considered a typographical error were not the argument of Government inconsistent with such an hypothesis. And as the distinction has been covered in the main brief for appellant, further reply is deemed unnecessary.

V.

There are some other fleeting suggestions in the Government's brief to which extended notice cannot be accorded. One is the reference to Downes *vs.* Bidwell (pp. 38-39),

as if this court had there passed on the question here involved, while in fact it, *ex industria,* refrains from doing so. Another is the undoubted truism that a citizen of the District is not a citizen of one of the States, and still another that the ordinance of 1787 prescribed judicial tenure during good behavior, in the western wilderness, where the first court was a triumvirate with the joint power of legislating and deciding. Any analogy to the division of power into executive, legislative, and judicial existing at the seat of Government that can be drawn from any of these instances is too remote to have any practical value.

MORGAN H. BEACH,
Of Counsel for Appellant.

WASHINGTON, D. C., *April* 7, 1906.

In the Supreme Court of the United States

OCTOBER TERM, 1905.

HARRIET T. JAMES, ADMINISTRATRIX OF Charles P. James, deceased, appellant,
v.
THE UNITED STATES.

No. 215.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES, APPELLEE.

STATEMENT OF THE CASE.

1. The claim in this case is asserted under the provisions of section 714 of the Revised Statutes, which reads as follows:

> SEC. 714. When any judge of any court of the United States resigns his office, after having held his commission as such at least ten years, and having attained the age of seventy years, he shall, during the residue of his natural life, receive the same salary which was by law payable to him at the time of his resignation.

The material facts sufficiently appear in the pleadings and findings of fact set forth in the Record, pages 1–12.

2. Concisely stated for the purpose of argument, the ultimate facts are as follows:

On July 29, 1872, the late Charles P. James was duly appointed by the President an associate judge of the Supreme Court of the District of Columbia. It is provided by statute that the judges of that court shall hold their offices during "good behavior" and Judge James held his office until December 1, 1892. He then resigned from that office, and his resignation was duly accepted on the last-mentioned date. He had attained the age of over 70 years and had held his commission as an associate justice of that court continuously for more than ten years.

From the time of his appointment until June 30, 1891, he was paid a salary of $4,000 per annum. During the fiscal year from June 30, 1891, to June 30, 1892, under a provision in a general appropriation act for that year, he was paid a salary of $5,000 per annum. From June 30, 1892, to December 1 of the same year (the date of his resignation), he was paid the salary appropriated for his office for that year, at the rate of $4,000 per annum. From the date of his resignation until the date of his death he was paid a salary at the rate of $4,000 per annum.

This suit was instituted by the appellant, as administratrix of the estate of the late Judge James, to recover the sum of $1,000 per annum from the date of his resignation, December 1, 1892, until the date of his death, August 9, 1899, the total sum being $6,688.90.

3. Before entering upon an argument on the questions of law involved in this appeal, we respectfully cite for the convenience of the court the

following statutory provisions that affected the salaries of the chief justice and the five associate judges of the Supreme Court of the District of Columbia until recent years:

The act of March 3, 1863, chapter 91 (12 Stat., 762), which established the Supreme Court of the District of Columbia, fixed the salary of the four justices (one of whom was to be chief justice) at $3,000 each, "to be paid quarterly at the Treasury of the United States." It provided that "these justices shall be appointed by the President, by and with the advice and consent of the Senate, and shall hold their offices during good behavior;" and that "each justice, before he enters on the duties of his office, shall take the oath prescribed to be taken by judges of the courts of the United States." [a]

The act of June 1, 1866 (14 Stat., 44, 45), fixed the compensation of the chief justice at $4,500 per annum, and of the "associate judges" at $4,000 each, "from and after the passage of this act."

The appropriation act for the fiscal year ending on June 30, 1892 (26 Stat., 908, 947), appropriated:

> For salary of the chief justice of the Supreme Court of the District of Columbia and the five associate judges, at the rate of $5,000 per annum each, $30,000.

---

[a] The act of June 21, 1870 (16 Stat., 160), added another associate justice to the court, who was to receive the same salary as the other associate justices; and the act of February 25, 1879 (20 Stat., 320), added another associate justice to the court, with the same salary as the other associate justices. Since then the Supreme Court of the District of Columbia has consisted of one chief justice and five associate justices, the latter sometimes called associate judges in appropriation acts.

The appropriation act for the fiscal year ending on June 30, 1893 (27 Stat., 183, 223), appropriated as follows:

> For salaries of the chief justice of the Supreme Court of the District of Columbia and the five associate judges, $24,500.

The sum so appropriated was the amount which had been fixed by law for the salaries of these six judges until the enactment of the first above-mentioned appropriation act for the fiscal year ending June 30, 1892.

During the fiscal year ending June 30, 1892, Judge James was paid a salary at the rate of $5,000 a year, as provided for in the appropriation act for that fiscal year.

The next succeeding fiscal year, ending on June 30, 1893, he was paid a salary at the rate of $4,000 a year, as appropriated for in the appropriation acts for that year; and as he resigned from the bench on December 1 of the same fiscal year, he was thereafter paid a salary at that rate until the time of his decease.

When Judge James resigned his office, as above stated, his successor was duly appointed to the vacant office, and was thereafter paid a salary at the same rate as that paid to the other associate justices of the court.

The act of February 9, 1893, which went into effect on April 3, 1893 (27 Stat., 434, 436), established a Court of Appeals in and for the District of Columbia, and provided that "the justices of the Supreme Court of the District of Columbia shall hereafter receive an

annual salary of $5,000 each, payable quarterly at the Treasury of the United States," and that one-half the salaries of the justices of both courts shall be paid out of the revenues of the District of Columbia; and Congress, by the act of March 3, 1893 (ib., 646, 653), appropriated $2,000 additional salary for the six judges of the Supreme Court of the District for the period from April 3, 1893, to July 1, 1893.

The appropriation act for the fiscal year ending June 30, 1894 (27 Stat., 675, 714), appropriated:

> For salaries of the chief justice of the Supreme Court of the District of Columbia and the five associate judges, $30,500. One-half of the foregoing amounts * * * shall be paid from the revenues of the District of Columbia.

The enacting clause of the above-cited acts provided that the appropriations were made "in full compensation" for the service of the fiscal year; and the last section of each act repealed all acts or parts of acts inconsistent or in conflict with any of its provisions.

The appropriation act for the fiscal year ending on June 30, 1895 (28 Stat., 162, 204), also contained the like enacting clause and repealing section and appropriated:

> For salaries of the chief justice of the Supreme Court of the District of Columbia and of the five associate judges, at $5,000 each, $30,000, one-half of which shall be paid out of the revenues of the District of Columbia.

Thereafter the like appropriations were made annually for a number of years for the salaries of those judges in the same terms and amounts, with like enacting clauses and repealing sections.

The deficiency appropriation act of March 2, 1895 (28 Stat., 843, 851), contained the following provision:

> To pay the chief justice and five associate justices of the Supreme Court of the District of Columbia the difference between the rate of compensation received by them and five thousand dollars per annum for the fiscal year eighteen hundred and ninety-three, four thousand one hundred and fifty-five dollars and forty-seven cents, or so much thereof as may be necessary.

Pursuant to this appropriation Judge James was paid in April, 1895, the sum of $415.80 for that part of the fiscal year 1893 during which he held the commission of associate justice of the Supreme Court of the District of Columbia, and out of the remainder of the appropriation the chief justice and the other associate justices who held commissions during the whole of the year were paid sums which, when added to the salaries appropriated for them in the regular appropriation act for the fiscal year ending June 30, 1893, would amount to $5,000 for the chief justice and $5,000 for each associate justice who was in office when claimant's decedent resigned, and a proportionate amount was paid to his successor in office.

BRIEF AND ARGUMENT.

I.

The act of March 3, 1891 (26 Stats., 908), operated merely as a suspension, and not a repeal, of the act of June 1, 1866 (14 Stats., 44).

Upon this state of law and facts, it is contended by counsel for appellant that the act of 1891 operated to permanently increase the salaries of judges of the Supreme Court of the District of Columbia, and that said court, being a court of the United States, within the provisions of section 1, Article III of the Constitution, the salary of Judge James was permanently raised by the provision in said appropriation act to $5,000 per annum, and could not thereafter be diminished during his tenure of office.

If, as they contend, the act of March 3, 1891, operated to increase the salary of the judges of the Supreme Court of the District of Columbia to $5,000 per annum each, and repealed absolutely the general act of 1866, under which said judges were given a salary of $4,000 per annum, it is not apparent why the act of July 16, 1892, should not have the same repealing effect upon the act of 1891. The same repealing elements are present in the former as in the latter act.

In the case of *United States* v. *Langston* (118 U. S., 389) it was held that in the absence of any declaration in the act that the appropriation should be in full compensation for the service for the fiscal year for which such appropriation was made, such appro-

priation would not suspend the operations of a general statute; but where such a provision was present, as in the case of the *United States* v. *Fisher* (109 U. S., 143), the court will give it effect, and consider it as an express declaration of Congress that the sum appropriated shall be in full compensation for services and that no greater or less sum can be allowed. In the Fisher case the general law provided a salary of $3,000 per annum for the chief justice of the Territory of Wyoming, but by the appropriation acts of March 3, 1877 (19 Stats., 294), and June 19, 1878 (20 Stats., 178, 194), the sum of $2,600 was appropriated in each of said acts, and the acts contained the provision that it should be in full compensation for the service of the fiscal year.

Construing the effect that the provisions of the appropriation acts had upon the general law, this court said:

> Not only do the words of the statute make the intention of Congress manifest, but that intention is plainly repugnant to the former statute, which fixes the yearly salary of the chief justice at $3,000. It is impossible that both acts should stand. No ingenuity can reconcile them. The latter act must therefore prevail, and the earlier act must, *for the time covered by the appropriation acts above referred to, be considered as suspended.*

It would seem, then, that the provision in the appropriation act of 1891 operated merely as a suspension of the provisions of the act of 1866, and temporarily increased the compensation of Judge

James for the fiscal year ending June 30, 1892, to $5,000. The Court of Claims decided this case upon the theory advanced by this court in the Fisher case; that a provision of this character in a general appropriation act would not permanently repeal, but only suspend the operation of a general law repugnant thereto. In other words, that the provision in the act of 1891 was only intended to be operative during the succeeding fiscal year. There is nothing to indicate that it was the intention of Congress to make the provision in the appropriation act of 1891 permanent legislation, for Congress, realizing its error, corrected it in the act of 1892, returning to the form and policy followed in all appropriation acts between 1866 and 1891.

If the position taken by the Court of Claims is correct, and we contend that it is, the salary of the judge in question remained fixed at $4,000 per annum up until the date of his death, except for the fiscal year ending June 30, 1892, provided he was entitled to legally avail himself of the provisions of section 714, Revised Statutes.

We think this interpretation of the provision contained in the appropriation act of 1891 conclusively determines this case. However, if any doubt remains in the mind of the court, it is our further contention that the supreme court of the District of Columbia is not a court of the United States under the provisions of section 1, Article III, of the Constitution, and not being such a court, Judge James was not entitled to

avail himself of the provisions of section 714 of the Revised Statutes.

This brings us to a consideration of the constitutional question involved in this case.

II.

CONSTITUTIONAL QUESTION.

What is the political status of the District of Columbia [Territory of Columbia], its judicial courts and its inhabitants?

THE DISTRICT OF COLUMBIA IS A TERRITORY OF THE UNITED STATES.

1. The States of Maryland and Virginia ceded to the United States for a seat of Government certain parts of their territory, or counties, and those cessions were accepted by Congress. On July 16, 1790 (1 Stat., 130), Congress passed an act entitled, "An act establishing the temporary and permanent seat of the Government of the United States." The first section of that act declares:

> That a district or territory not exceeding ten miles square, to be located as hereafter directed on the river Potomac, at some place between the mouths of the Eastern Branch and Connogochegue, be, and the same is hereby, accepted for the permanent seat of the government of the United States. *Provided nevertheless*, That the operation of the laws of the state within such district shall not be affected by this acceptance, until the time fixed for the removal of the government thereto, * * *. (See act of March 3, 1791, ch. 17, partly repealing the location of the new "territory.")

The same act directed the removal of the seat of Government to Philadelphia, and to so remain until the year 1800; and the last section provided that on the first Monday in December, in the year 1800, the seat of Government shall be transferred "to the district and place aforesaid."

We do not propose to rely upon an argument based upon nomenclature; but it will be observed that this act calls the seat of government of the United States "a district or territory."

THE COURTS OF THE DISTRICT OF COLUMBIA ARE TERRITORIAL COURTS, AND NOT UNITED STATES COURTS.

The act of February 27, 1801 (2 Stat., 103), seems to be the first that established a local judiciary for the District. In that act the Eighth Congress of the United States followed the precedent set by the old Confederate Congress on July 13, 1787, in the "Ordinance for the government of the territory of the United States northwest of the Ohio River" (Rev. Stat., p. 13). Section 4 of the ordinance prescribed that the commissions of the judges "shall continue in force during good behavior," and section 3 of the said act of February 27, 1801, prescribed that the Circuit Court and the judges thereof of the District of Columbia "shall have all the powers by law vested in the circuit courts and the judges of the circuit courts of the United States." This is exactly the same Federal jurisdiction and power that Congress has vested in all the corresponding courts and judges of all the other organized Territories. Moreover, the same section followed the precedent of the old

ordinance in that it prescribed in the same section 3, that the judges of the Circuit Court of the District of Columbia shall "hold their respective offices during good behavior." This legislation, instead of showing identity of courts, merely shows an assimilation of the jurisdiction, powers, and tenure of office of Territorial judges to those of the judges of "United States courts."

This act also created other judicial districts and courts in the States named therein and reorganized the United States judicial circuits, but it omits from any of the circuits "the District of Potomac." The previous judiciary act, entitled "An act to provide for the more convenient organization of the courts of the United States" (2 Stat., 89), had constituted from a part of the territory of the United States northwest of the Ohio River "the Indiana Territory" as a judicial district to be called the "District of Ohio," and its sixth section grouped all the judicial districts of the United States into six circuits, which included in the sixth "the District of Ohio." That district, it will be remembered, was then composed of the Northwest Territory and the Indiana Territory. Up to that time Congress, when legislating for the organization of the judicial department of the Government, seems to have regarded the courts in the Territories, including the District Court for the "District of Potomac" in the "Territory of Columbia," as component parts of the judicial system of the United States; but it must be admitted that the Sixth and previous Congresses were not as well informed as

later Congresses of the constitutional distinctions between organized Territories and the States of the Union. However, Chief Justice Marshall clearly drew the lines of distinction, in *American Insurance Co.* v. *Canter* (1 Pet., 511), between Territorial and United States courts, and they have never been redrawn nor obliterated up to the present day.

Speaking there of "the three distinct classes of cases" to which the judicial power of the United States extends, he said:

> The discrimination made between them in the Constitution is, we think, conclusive against their identity.

Applying the same language to "constitutional courts" and "legislative courts," we would say that the two distinct powers granted to Congress to ordain them "is conclusive against their identity." Anyone who supposes that the profound jurist considered "tenure of office" as a distinction and not merely as an illustration, does not, we think, understand his "opinion."

The principles argued and contested in this court in the "Insular Cases," to which we will refer later, were decided on those constitutional lines.

2. It may as well be unqualifiedly asserted here and distinctly borne in mind throughout the whole argument of this case that—

> *It has always been the plain intent of Congress, so far as practicable, to place the people of the District of Columbia and of the organized Territories on an equality in the enjoyment of*

judicial privileges with the people of the States of the Union in their respective judicial districts within those States. Therefore no argument based upon similarity or analogy of jurisdiction or judicial power can have the slightest bearing upon the question of constitutional law presented in this case.

NOMENCLATURE.

3. In the act of May 6, 1796 (1 Stat., 461), the city of Washington is mentioned as being "in the District of Columbia."

In the act of April 30, 1798, it is again mentioned as being "in the District of Columbia."

The act of February 13, 1801 (2 Stat., 89), entitled "An act to provide for the more convenient organization of the courts of the United States," which was repealed by the act of March 8, 1802 (2 Stat., 132), also names "the Territory of Columbia" and recognizes it as having been, before its cession, territory within the United States judicial districts of Maryland and Virginia, and establishes within "the Territory of Columbia" certain parts of the "District of Maryland" and the "District of Virginia." This act is clearly a general national judiciary act, and at first view its provisions seem to bear against our contention, viz, that none of the courts of the District of Columbia are constitutional courts within the meaning of Chief Justice Marshall's opinion in the leading case of *American Insurance Company* v. *Canter*, supra. Unquestionably this act was a federal judiciary act,

because it provides not only a new district court for the Territory of Columbia, but enacts that the—

> * * * new district shall be called the District of Potomac, and a district court in and for the same shall be holden at Alexandria by the district judge of the District of Maryland on the first Tuesday in April and the first Tuesday in October in each and every year.

The act of February 27, 1801 (2 Stat., 103), is indexed in that volume as "An act concerning the District of Columbia."

The act of March 3, 1801 (2 Stat., 115), is entitled "An act supplementary to the act entitled 'An act concerning the District of Columbia.'"

In the act of May 1, 1802 (2 Stat., 175), we find the city of Washington as being in "the permanent seat of the Government of the United States."

The same nomenclature, "District of Columbia," appears on pages 193 and 195 of the same volume.

The act of March 3, 1803 (2 Stat., 227), is entit ed "An act concerning the insurance of buildings, goods, and furniture in the county of Alexandria, in the Territory of Columbia."

In the act of February 24, 1804 (2 Stat., 254), we find the seat of Government designated as the "District of Columbia."

On page 259 of the same volume we find legislation for the inhabitants "residing within the territory ceded to the United States by the treaty of April 30, 1803, between the United States and the French Republic" as being inhabitants of the "District of Orleans."

In the act of March 26, 1804, we find the "District of Orleans" erected into two Territories, i. e., Mississippi and Louisiana, the latter called the "Territory of Orleans" (2 Stat., 283).

In the act of March 2, 1805, mention is made of the Territory of Orleans (2 Stat., 324).

We make the above citations merely to show that the seat of Government was first designated as the Territory of Columbia, and that afterwards its nomenclature was changed to the title "District of Columbia."

As late as the year 1840 we find this Court, speaking by Mr. Justice Catron, saying that the counties of Alexandria and Washington "constitute the territory of Columbia and are united under one territorial government" (Bank of Alexandria *v.* Dyer, 14 Pet., 146). Indeed, as late as January, 1891, we find this court classing the District of Columbia with the organized Territories of the United States in all its illustrations of the distinctions of status between States and Territories. (*Downs* v. *Bidwell*, 182 U. S., 244.)

4. But, as was said before, nomenclature is not argument, and whether we *call* the seat of government a District or a Territory is not material to the present question. Unquestionably the present seat of government was ceded to the United States by the State of Maryland, and it has been treated by Congress and by the United States courts as a Territory acquired under the Constitution (Art. I, sec. 8, cl. 17) and has

been governed as a Territory by Congress under that clause and under clause 2, section 3, Article IV. The moment the seat of government was established here the former inhabitants of that part of the State of Maryland at once lost their political status as citizens of the State of Maryland and had only the political status of inhabitants of a Territory (*Georgetown* v. *Alexander Canal Co.*, 12 Pet., 96). Thereafter they could only become possessed of their former political rights by emigrating to Maryland or to some other State of the Union; and the District itself could not again become a State, or part of a State, of the Union even if Congress should so desire. (Art. IV, sec. 3, cl. 1.) It is not necessary to enumerate the political rights which the inhabitants of the District of Columbia can not exercise in this District. We may be allowed to refer to a few of them, for example: They can not elect a Senator or Representative for the District to Congress; they can not vote for an elector for the President or Vice-President in this District; they can not elect a local government for the District. They are *governed* by Congress. Their political status is only Territorial, and it is limited to a greater extent than the status of the inhabitants of any other organized Territory of the United States. In the other Territories Congress allows the inhabitants a republican form of government, consisting of three departments—the legislative, executive, and judicial. Here we have neither of these departments now. The inhabitants of the

District of Columbia are governed by Congress directly through an executive department and a judicial department appointed by the President as prescribed by law, and Congress alone legislates for the District.

Of course, the Constitution extends over the District of Columbia as much as over any other organized Territory, and of course Congress has the power to prescribe the tenure of office of the judges of the courts of the District of Columbia to the same extent that it can prescribe tenure of office, *subject to the pleasure of the President*, in any other organized Territory. Nevertheless, relying upon Chief Justice Marshall's opinion, we deny the power of Congress to establish a judicial court of the United States in and for the District of Columbia. Per Thompson, J., in *Livingston* vs. *Story* (9 Pet., 656):

> That Congress has the power to establish circuit and district courts in any and all the States * * * * can not admit of a doubt,

and Congress has not the power to establish a United States court in a Territory.

In *Shoemaker* v. *The United States* (147 U. S., 282, 300), Mr. Justice Shiras, answering a contention of counsel, said as follows:

> But this contention can scarcely have been seriously made in view of the explicit language of the Maryland act in its second section: "That all that part of said Territory called Columbia which lies within the limits of this State shall be, and the same is hereby, ac-

> knowledged to be forever ceded and relinquished to the Congress and Government of the United States in full and absolute right and exclusive jurisdiction, as well of soil as of persons residing or to reside thereon, pursuant to the tenor and effect of the eighth section of the first article of the Constitution of Government of the United States." (*Mattingly* v. *District of Columbia*, 97 U. S., 687, 690; *Gibbons* v. *District of Columbia*, 116 U. S., 404.)

Here we find in the said Maryland act perhaps the origin of the phrase "Territory called Columbia."

No inhabitant of the District of Columbia or other Territory can maintain a suit in a United States Circuit Court against a citizen of any State of the Union, although every citizen of a State has that constitutional right.

> *Hepburn* v. *Ellzey*, 2 Cr., 444;
> *Reily* v. *Lamar*, ib., 344;
> *Fenwick* v. *Sear's administrators*, 1 Cr., 259.
> *New Orleans* v. *Winter*, 1 Wheat., 91.

5. The fact that Congress has prescribed that the judges of the Supreme Court of the District of Columbia and of the Court of Appeals of the District shall be appointed by the President and hold their offices "during good behavior" is evidence that Congress did not regard the judges of those courts as judges of a United States Court. No doubt Congress was following an old precedent derived from Maryland:

> That the chancellor, all judges, the Attorney-General, clerks of the General Court, clerks of the county courts, the registrar of the land

> office, the registrars of wills shall hold their commissions during good behaviour, removable only for misbehaviour on conviction in a court of law (State Const. of 1776, Art. XL; Bill of Rights, Art. 30. Const. of 1851. See also Mass. Const. of 1780, Chap. III, Art. 1).
>
> "All judicial officers duly appointed * * * shall hold their offices during good behaviour."

The necessary inference from their statutory tenure of office is that the Judges of the District of Columbia are not United States Judges. The tenure of office of the United States Judges is never referred to in any law of Congress, because their tenure is granted by the Constitution itself, and Congress seldom, if ever, enacts unnecessary legislation. This is not the only legislative grant to judges of tenure of office "during good behavior." The judges of the territory of the United States northwest of the river Ohio were appointed by the Congress of the Confederation, and the Ordinance prescribed that: "Their commissions shall continue in force during good behavior." (1 Stat., 51.) At one time the judge or judges of the Territory of Michigan were appointed to hold their offices "during good behavior." (5 Stat., 13.) That Territory was carved out of "the territory of the United States northwest of the river Ohio" by the act of January 11, 1805, and its third section continued that judicial tenure of office. (2 Stat., 349.) We do not for a moment contend that the Congress could not provide, as they have done, that the judges of the courts for the District of Columbia should hold their offices "during good behavior." We think, with the

court below, that it was the intention of the framers of the Constitution that the people at the seat of government should have a permanent government, and that their local courts should be a part of their government. The Congress evidently so construed the Constitution when they granted tenure of office during good behavior to the judges of the Supreme Court of the District and the judges of the Court of Appeals. We may be allowed to add that perhaps similar tenure of office might be properly granted to the principal officers of the executive branch of the District government.

In *Downes* v. *Bidwell*, 182 U. S., 244, 259, Mr. Justice Brown said of *New Orleans* v. *Winter* that in that case "an attempt was made to distinguish a territory from the District of Columbia." Evidently the attempt was a failure, as it will be here.

THE COURTS OF THE DISTRICT OF COLUMBIA ARE TERRITORIAL COURTS, NOT UNITED STATES COURTS.

We know that in *Embry* v. *Palmer* (107 U. S., 3, 10), Mr. Justice Matthews, delivering the opinion of this court, said: "That he Supreme Court of the District of Columbia is a court of the United States results from the right of exclusive legislation over the District which the Constitution has given to Congress." The language quoted is not a decision that those courts are "courts of the United States" within Chief Justice Marshall's definition of "constitutional courts." On the contrary, the langauge rather favors our contention.

Was Judge James a judge of a court of the United States, within the meaning of section 714 of the Revised Statutes of the United States?

We are not aware that section 714 of the Revised Statutes has ever been interpreted or construed by any judicial court. Nor are we aware that the political status of the courts of the District of Columbia has ever been directly judicially decided. The case of *United States* v. *Dana et al.* (Fed. Rep., vol. 68, p. 886), which originated in the United States District Court for the Southern District of New York, comes nearer to deciding the principle of the judicial distinction between the courts of the District of Columbia and the courts of the United States than any other recent decision that we know of. The question in that case arose under section 1014 of the Revised Statutes of the United States, and the decision created considerable interest in the District of Columbia. Mr. Dana, editor of the New York Sun, had been indicted in the Supreme Court of the District of Columbia. Commissioner Shields had held him under that section on an application made to the New York district judge for an order removing the prisoner to Washington for trial in the Supreme Court of the District of Columbia. The question was elaborately argued by able counsel on both sides, among them the present distinguished Secretary of State, Mr. Elihu Root, and the late Jeremiah Wilson, who was then one of the leading members of the District of Columbia bar. Delivering his opinion, District Judge Brown incidentally reviewed the statutory jurisdic-

tion of the Supreme Court of the District of Columbia. He said:

> It is plain, however, that the judiciary act did not contemplate any such local offenses as libel in the District of Columbia. In the Federal system there are no common-law crimes.

And he cited the case of *United States* v. *Hudson* (7 Cr., 32) and quoted from the opinion of Mr. Justice Johnson in *United States* v. *Coolidge* (1 Wheat., 415), as follows:

> The legislative authority of the Union must first make an act a crime, affix a punishment, and declare the court that shall have jurisdiction of the offense.

And held that—

> There has never been any statute either of the United States or of the State of Maryland making libel a criminal offense, or defining its punishment. The present indictment rests wholly upon the old common law of Maryland and upon the act of Congress of February 27, 1801 (2 Stats., 104), accepting the session of that district, and providing that "the laws of Maryland as they now exist shall be and continue in force," except as modified, etc.
>
> Assuming, though that point also is disputed, that libel in the District of Columbia is a criminal offense, it is nevertheless a purely local offense. It is no part of the Federal system of laws, nor related to the general legislation of Congress. In administering the local law of the District of Columbia the National Government there acts as the State govern-

ments act within their several limits in administering the ordinary rights of person and property. That is an exceptional and a wholly different field of action from what is embraced in ordinary Federal legislation, and it was evidently wholly foreign to the scope of the judiciary act. Offenses against the local law of the District of Columbia are, in a sense, offenses against the United States, becausethe United States is the local governing authority. * * * But the judiciary act was not dealing with or contemplating this exceptional and local relation. The District of Columbia had then no existence. The scope and aim of the judiciary act were manifestly purely Federal and national. It created the Federal courts authorized by the Constitution for the country at large; it defined their jurisdiction, civil and criminal; and it established the districts in which each might act. * * * What offenses are referred to? Manifestly those Federal offenses only of which the courts thereby created had jurisdiction; offenses which those courts were designed to try and could try; since the only subject of consideration was the national Federal courts, and trials in those courts alone. Those offenses were Federal offenses arising under Federal statutes applicable throughout the country.

* * * * *

At that time a Territorial government and Territorial courts had been organized under the ordinance of 1787 in the Northwest Territory. But no one would contend that mere local offenses committed in that Territory

and not embraced in any general legislation of Congress were removable "offenses" under the judiciary act any more than that its Territorial courts were "courts of the United States" in the sense of a judiciary act or of ordinary legislation. When the District of Columbia was afterwards acquired its courts and local offenses under the local law alone were in the same category as those of the Territories. That none of those courts were "courts of the United States," in the sense of ordinary legislation, has been long adjudicated, because they do not belong to the Federal system, and are not courts of the Constitution, nor created under the judicial power, but under a separate authority in the Constitution to make "all needful rules and regulations for the Territories." * * * (*Insurance Company* v. *Canter*, 1 Pet., 511, 546; *Clinton* v. *Englebrecht*, 13 Wall., 447; *Hornbuckle* v. *Toombs*, 18 Wall., 648, 655; *McAllister* v. *United States*, 141 U. S., 182, 184; 11 Sup. Ct., 949.) There is the same distinction between local and Federal offenses.

This case perhaps practically decides that the Supreme Court of the District of Columbia is not a "court of the United States" under section 714 of the Revised Statutes, and that that section does not include judges of the courts of the District of Columbia. We infer from District Judge Brown's closing remarks that he would have regarded any *construction* of section 1014 of the Revised Statutes of the United States that would include courts of the District of Columbia and judges thereof as United States courts

and judges as *judicial legislation*. He says, on page 904 of the Federal Reporter, referring to the report of the distinguished Senate Judiciary Committee, partially printed on page 902:

> Meantime, it is not for this court to anticipate or presume upon the intent of Congress on that subject, or to attempt to supply any supposed defects in the statutes by wrenching them from the true meaning and intent with which they were enacted; least of all when doing so would introduce a new class of removals in favor of the District of Columbia alone, while similar removals are denied, under the Constitution and laws, to every other district and State in the country.

And if the extradition had been applied for to any other Territory of the United States, it would have added after the word "State" the words "and Territory." However this may be, the question of such extradition is settled by this court in *Benson* v. *Henkel* (198 U. S., 1).

Our contention in the case at bar necessarily is that section 714 of the Revised Statutes must be regarded as an amendment to a judiciary act, "that the scope and aim of that section is manifestly purely Federal and national" and has no relation whatever to the courts and judges of the District of Columbia, and that to construe its provisions so as to include those courts and judges would be *judicial legislation*.

There is a very able official report to which we would like to refer the honorable court that, in a few words, substantially disposes of the distinction be-

tween the United States courts and the courts of the "Territories and the District of Columbia." It is the report of a very distinguished Attorney-General—Hon. Caleb Cushing. It is one of our State Papers. On February 4, 1854, President Pierce sent it to the House of Representatives with a letter addressed to the Speaker, dated March 1, 1854, which reads as follows:

> I transmit, herewith, a report of the Attorney-General, in answer to the resolutions of the House on the 22d of December, requesting me to communicate to the House the plan for the modification and enlargement of the judicial system of the United States, recommended in my annual message to Congress.

The report is printed as an Executive Document. (H. R. No. 73, Thirty-third Congress, first session.)

In the last paragraph of his report, Attorney-General Cushing said:

> I have abstained from remarks as to the courts of the Territories and of the District of Columbia, which are established under other clauses of the Constitution than those herein considered, and which are not presumed to be within the purview of the resolutions of the two houses. It may, however, be not improper to say here, that the legal condition of the District of Columbia, still regulated by the laws of Maryland as they stood half a century ago without material legislative improvement during that period of time, and with recognized defects in its organization, calls loudly for some action on the part of Congress.

Except the paragraph last above quoted, the whole report relates exclusively to "the judicial system of the United States," and its great author did not "presume" to consider the joint resolution as extending to the District of Columbia or any of the Territories.

The judicial system above referred to was then well understood to consist solely of the Supreme Court of the United States, its Chief Justice, and the Associate Justices, the United States district courts, and the United States circuit courts in the several States, and the judges of those Federal courts. Hence, it is well understood by all judicial courts, and by all lawyers that all the legislation of Congress in the several judiciary acts is intended only for "courts of the United States" and the judges of those courts; and especially is it so in regard to provisions for their salaries; hence, section 714 of the Revised Statutes relates exclusively to the courts and judges above enumerated.

It is, therefore, not difficult to correctly interpret the provisions of that section upon which the claim at bar is erroneously asserted. Indeed, we think it would be impossible for any judicial mind to strain its words so as to include the courts and judges of the courts of the District of Columbia, or the courts established by Congress in any of the organized Territories. Indeed the court below has clearly not attempted to do so.

THE LEGISLATIVE HISTORY OF SECTION 714 OF THE REVISED STATUTES.

It may be a little interesting to trace the "history of the legislation" contained in that section. To do this properly, we may begin by saying that section 714 of the Revised Statutes was enacted from section 5 of the judiciary act of April 10, 1869. (16 Stats., 44, 45.) It had been originally offered by Senator Drake, of Missouri, as an amendment to a former bill [Senate bill No. 784; Cong. Globe, Index, p. xl, vol. 85] entitled "A bill to amend the judiciary system of the United States," which had been introduced by Senator Trumbull.

That bill was duly referred to the Judiciary Committee of the Senate (p. 414), reported back with an amendment (p. 813), and discussed in the Senate (pp. 1366, 1367, 1407, 1483–1489). Senator Drake (afterwards Chief Justice of the Court of Claims) offered an amendment (p. 1488), which reads as follows:

> *And be it further enacted*, That any judge of any court of the United States who shall, after having attained the age of seventy years, resign his office, shall thereafter, during the residue of his natural life, receive the same salary which was by law payable to him at the time of his resignation.

Senator Grimes asked him whether the amendment would embrace "the judges of the new circuit system and the judges of the district courts." He answered that—"they are embraced in it. The language is: 'Any judge of any court of the United States.'"

Senator Grimes replied: "If we are going to establish a civil pension list, why should we not embrace marshals, district attorneys, and clerks?"

As the real purpose of the proposed bill was to relieve the strain upon the mentally and physically vigorous judges of the United States courts of having to perform the judicial functions of superannuated judges, the amendment was conclusively shown as being the only one that could constitutionally relieve the physically vigorous judges from the strain of having to perform the judicial functions of the superannuated judges, and that it could not be regarded as in any sense inaugurating a civil pension list. Nevertheless, as the bill was an exceedingly important one, the Senators were constrained to reject the proposed amendment. It was feared that the bill might not become a law, as the relations between the President and the Congress were not at that time congenial; therefore that bill did not receive the President's approval. This court has already taken judicial notice of that unfortunate historical incident. (See *Parsons* v. *United States*, 163 U. S., 324.) Practically the same bill was introduced in the Senate by Senator Trumbull, on March 8, 1869, and referred to the Committee on the Judiciary. (It was Senate bill No. 44, Forty-first Congress, first session; Congressional Globe, vol. 87, p. 29.) The bill was reported back by Mr. Trumbull with an amendment (ib., 62). On March 17, 1869, he asked to have an amendment appended to the bill. On March 22,

1869, on his motion, the Senate proceeded to consideration of the bill (ib., 192). Senator Trumbull thought it was only necessary to read the amendment of the committee, and the chief clerk read the amendment (ib.,), including the amendment and the committee's amendment, which Senator Drake desired to offer. The bill was discussed in the Senate (ib., 192, 207–217, 219). In the same Congress another judiciary bill (House bill No. 10) was pending, which Representative Bingham, by instructions of his committee, reported for a substitute, of which sections 5 and 6 provided for the *retirement* of judges of the courts of the United States in the following language (ib., 337):

> SEC. 5. *And be it further enacted,* That any judge of any court of the United States who is now seventy years of age, and that any judge thereof who shall hereafter become seventy years of age, and who shall have served at least ten years as such judge, may, upon his filing with the President a certificate of that fact, be excused and retired from active service as such judge; and thereafter he shall, during the time he shall continue to hold said office, be entitled to receive from the United States the same salary that he was by law entitled to at the time of filing his certificate: *Provided,* That if any judge who shall have attained the aforesaid age shall be incompetent, by reason of disease or infirmity, to make and file such certificate, the facts of his age and incompetency may be proved by

> satisfactory evidence before any judge of the Supreme Court; and upon such justice filing his certificate of such facts with the President the said judge shall thereupon be excused and retired with like effect as upon his own certificate.

On April 1, 1869, Senator Trumbull, from the Committee of the Judiciary, to whom were referred the amendments of the House of Representatives to the said Senate bill No. 44, reported it with an amendment (ib. 439). On April 7, 1869, Senator Trumbull moved that the Senate proceed to the consideration of the amendment of the House, to which the Senate Committee on the Judiciary had proposed amendments (ib. 574), and the Chief Clerk "read the amendment of the House as amended, which was to strike out all of the original bill after the enacting clause, and to insert in lieu thereof the following:"

[It is not necessary here to quote anything except section 5, on page 575, which reads as follows]:

> SEC. 5. *And be it further enacted*, That any judge of any court of the United States who shall, after attaining the age of seventy years, resign his office, shall thereafter, during the residue of his natural life, receive the same salary which was by law payable to him at the time of his resignation.

It seems that the House amendment did not contain the section above quoted, and that that section was added by the Senate Committee on the Judiciary (ib. 574). It was then considered as a provision

for "retiring judges when they arrived at 70 years of age" (ib. 650); and "the amendment, as amended, was concurred in" (ib. 576). April 8, 1869, the House agreed to the amendments of the Senate to the amendment of the House (ib. 630, 646–647, 649, 650). On page 650 it appears that Mr. Schenck offered the following amendment to the amendments of the Senate:

> In section 5, after the word "who," insert "having held his commission as such at least ten years;" so that it will read:
>
> That any judge of any court of the United States, who, having held his commission as such at least ten years, shall, after having attained to the age of seventy years, resign his office, shall thereafter, during the residue of his natural life, receive the same salary which was by law payable to him at the time of his resignation.

And the proposed amendment was then adopted. On the next day (April 9) the Senate "agreed to the amendment of the House to the amendments of the Senate to the amendment of the House to Senate bill No. 44." The bill became a law on April 10, 1869, and said section 5 was reenacted on June 22, 1874, as section 714 of the Revised Statutes of the United States, in substantially the same words in which it was enacted as section 5 of the act of April 10, 1869 (16 Stats., 45).

This amendment of Senate bill No. 44, entitled "A bill to amend the judicial system of the United

States," offered a way out of the most perplexing dilemma that any Congress has ever had to confront. It seems that throughout the debates on the two judiciary bills the problem of relieving the courts and judges of the United States from the strain of superannuated judges was insoluble, until at last the idea of voluntary resignation pointed the only way out of the dilemma with masterful manifestation in the words of that section.

Nothing that at this day could be argued pro or con could impress upon this court the idea that section 714 of the Revised Statutes could be construed so as to include the judges of any courts that are not constitutional courts as defined by Chief Justice Marshall in distinction from legislative courts and judges. Of the latter class Congress has established great numbers, including many in this District; for instance, the Court of Appeals of the District of Columbia, the Supreme Court of the District of Columbia, the Orphans' Court, the police courts, the justices of the peace, and from time to time we have "commissions" sitting here clothed by Congress with judicial functions. Certainly if any of these "courts" or commissions is a constitutional court under Article III, section 1, of the Constitution, all of them are such courts, and if this case should be decided in favor of the appellant it would become (what we consider impossible) a precedent for similar suits.

SUMMARY.

We insist that:

First. The District of Columbia is the seat of government of the United States. (Const., Art. IV, sec. 3, cl. 2; also Art. I, sec. 8, cl. 17.)

Second. The District of Columbia is a permanently organized Territory of the United States.

Third. The framers of the Constitution intended that the Congress, the President, and the Supreme Court should perform their respective functions at the seat of government.

Fourth. The political status of the District of Columbia, its judicial courts and judges, and domiciled inhabitants, is Territorial in every sense, and is not distinguishable, constitutionally, from the status of the people and the corresponding courts and judges in the other Territories of the United States.

Fifth. The Congress has no constitutional power to establish a District or Circuit Court of the United States in and for the seat of government, nor in and for any other organized Territory of the United States.

Sixth. The courts established for the people of the District of Columbia have jurisdiction and judicial powers assimilated as nearly as practicable to the jurisdiction and judicial powers of the United States courts in the States of the Union, and also much larger jurisdiction than Congress can confer upon any court of the United States.

COROLLARY:

Seventh. Subject to the will of the President (Parson's case, *supra*), the Congress has legislative power to prescribe for the judges of the judicial courts of the District of Columbia a tenure of office "during good behavior," and may prescribe the like tenure for the Federal judges of any other Territory; and Congress may at any time extend to them the same privileges of resignation offered in section 714, Revised Statutes, to judges of courts of the United States; but no judicial court can do that by construction. Congress has reserved to itself that discretionary power. (Judge McCandless' case, 19 Stat., 57, 318.)

III.

The authorities cited by counsel for appellant do not sustain their contention.

This court, in the case of *Downes* v. *Bidwell* (182 U. S., 263), reviewed some authorities which we think have a bearing upon the case at bar. We quote from the opinion of Mr. Justice Brown as follows:

> * * * *Hepburn* v. *Ellzey*, in which this court held that under that clause of the Constitution limiting the jurisdiction of the courts of the United States in controversies between citizens of different States, a citizen of the District of Columbia could not maintain an action in the Circuit Court of the United States. It was argued that the word "State" in that

connection was used simply to denote a distinct political society.

On this point Chief Justice Marshall said:

> But as the act of Congress obviously uses the word "State" in reference to that term as used in the Constitution, it becomes necessary to inquire whether Columbia is a State in the sense of that instrument. The result of that examination is a conviction that the members of the American Confederacy only are the States contemplated in the Constitution.

In the case of *New Orleans* v. *Winter* (1 Wheat., 91) Chief Justice Marshall said:

> In the case of *Hepburn* v. *Ellzey* this court determined, on mature consideration, that a citizen of the District of Columbia could not maintain a suit in the Circuit Court of the United States. That opinion is still retained. It has been attempted to distinguish a Territory from the District of Columbia; but the court is of opinion that this distinction can not be maintained. They may differ in many respects, but neither of them is a State in the sense in which that term is used in the Constitution. Every reason assigned for the opinion of the court, that a citzen of Columbia was not capable of suing in the courts of the United States, under the judiciary act, is equally applicable to a citizen of a Territory.

* * * * *

In *Jeofroy* v. *Riggs* (133 U. S., 258) the District of Columbia as a political community was held to be one of the States within the meaning of that term as used in a consular convention of February 23, 1853, with France, where it related to the right of Frenchmen to hold, dispose, and inherit property in the same manner as citizens of the United States.

Referring to this decision Mr. Justice Brown said:

> This case may be considered as establishing the principle that in dealing with foreign sovereignties the term "United States" has a broader meaning than when used in the Constitution, and includes all Territories subject to the jurisdiction of the Federal Government, wherever located. In its treaties and conventions with foreign nations this Government is a unit. This is so not because the Territories comprised a part of the Government established by the people of the States in their Constitution, but because the Federal Government is the only authorized organ of the Territories, as well as of the States, in their foreign relations.

The court in summing up the Downes case, among other conclusions, announced the following:

> That the District of Columbia and the Territories are not States, within the judicial clause of the Constitution giving jurisdiction in cases between citizens of different States.
>
> That the District of Columbia and the Territories are States as that word is used in treaties with foreign powers with respect to the ownership, disposition, and inheritance of property.

> That the Territories are not within the clause of the Constitution providing for the creation of a Supreme Court and such inferior courts as Congress may see fit to establish.

Thus it will be observed that the District of Columbia and the Territories are regarded as being on the same footing, within the judicial clause of the Constitution as it relates to cases between citizens of different States. And the District of Columbia and the Territories are treated as States, in that the provisions of the Constitution relating to the protection of life, liberty, and property extend to all persons within the territorial limits of the United States, whether those limits be embraced in Territories or States.

It is likewise to be observed that the Territories not being within the clause of the Constitution providing for the creation of a Supreme Court and such inferior courts as Congress may see fit to ordain and establish, and the District of Columbia not being within that clause of the Constitution giving jurisdiction in cases between citizens of different States, it must follow as a logical conclusion that the courts of the District of Columbia are not organized within the provisions of section 1, Article III, of the Constitution, but of section 2, Article IV, or section 8, clause 17, Article I, of the Constitution.

In the cases of *Page* v. *Burnstine* (102 U. S., 664) and *Good* v. *Martin* (95 U. S., 90), cited by counsel for appellant, it is nowhere held that the courts of the District of Columbia are courts of the United States under the Constitution. While it is held that

the general laws of the United States in relation to the competency of witnesses in courts of the United States are applicable to the courts of the District of Columbia and are inapplicable in the Territories, yet this distinction does not turn upon the character of the courts, but upon the source of the legislation. The "general law" cited (R. S. 858) was held not applicable to the Territorial courts, because the Territories have legislatures empowered to enact laws relating to the competency of witnesses, while Congress not only enacts such laws for the United States, but likewise for the District of Columbia. Hence the enactments of Congress in relation to the practice in the courts of the United States would have force and effect in the District of Columbia, but not in a Territory, if repugnant to the Territorial law. The distinction made between Territorial courts and the courts of the District of Columbia is clearly set forth in *Page* v. *Burnstine* (*supra*), at page 668, where the court said:

> These views do not at all conflict with the previous decisions of this court, holding that certain provisions of the general statutes of the United States relating to the practice and proceedings in the "courts of the United States" are locally inapplicable to Territorial courts. Those decisions, it will be seen, proceeded upon the ground, mainly, that the legislatures of the Territories referred to, in the exercise of power expressly conferred by Congress, had enacted laws covering the same subjects as those to which the general stat-

utes of the United States referred. It was, therefore, ruled that the Territorial enactments regulating the practice and proceedings of Territorial courts were not displaced or superseded by general statutes upon the same subject passed by Congress in reference to "courts of the United States."

Benson v. *Hinkel* (198 U. S., 1), cited by counsel, refers to the extradition, under section 1014 of the Revised Statutes, of a person charged with an offense against the United States from the district in which he may be found to the district wherein the offense is alleged to have been committed. This section was held to apply to the District of Columbia, and the case has not even a remote bearing upon any question in the case at bar as a judicial decision. It applies likewise to all Territories of the United States. It is a general provision in criminal procedure applying equally between the States and Territories. True, as contended by counsel in the case of *Kendall* v. *The United States* (12 Pet., 524), the Circuit Court of the District of Columbia is referred to as the Circuit Court of the United States for the District of Columbia. So would like reference be properly made by this court to-day in a case appealed from the Circuit Court of the United States for the Eastern or Western District of the Indian Territory or the District of Porto Rico or Hawaii. We do not apprehend that anyone would contend for a moment that simply because these territorial courts are sometimes called circuit courts of the United States as in *Embry*

v. *Palmer* (*ante*), they would be held to be courts of the United States under Article III of the Constitution.

In the Code of the District of Columbia it is declared by section 61, that the Supreme Court of the District—

> * * * shall possess the same powers and exercise the same jurisdiction as the Circuit and District Courts of the United States, and shall be deemed a court of the United States.

Of course that section well illustrated what we have before stated, that—

> It has always been the plain intent of Congress as far as practicable to place the people of the District of Columbia and the people of the organized territories on an equality in the enjoyment of judicial privileges with people of the States.

In *American Insurance Company* v. *Canter* (1 Pet., 511), cited by counsel, the statement of the Chief Justice to the effect that the fact that judges held office for four years in the Territories is conclusive proof that such offices were not created under the constitutional clause according to which judges must have life tenure, is taken by counsel to imply that the judicial tenure fixed by Congress is decisive as making the courts of the District of Columbia courts of the United States, under Article III of the Constitution. While it is true that the fixing of the tenure of office of a judge at four years is a conclusive declaration by Congress that the court is not an inferior court under Article III of the Constitution, the converse is by no means true, that

legislative tenure "during good behavior" is conclusive proof that the court is organized under Article III of the Constitution. As before stated, this is a mere legislative declaration of the tenure of office. Congress could, with equal propriety, declare a life tenure in the courts of the Territories, as it did in the organization of the Northwest Territory and the Territory of Wisconsin. (1 Stat., 50; 5 Stat., 13.)

In *Downes* v. *Bidwell* (182 U. S., 244), it is conceded by all the judges that Congress has the constitutional power to govern the Territories. Defining the distinction between Territorial courts and United States courts, Mr. Justice Brown, delivering the opinion of the court, said, reviewing Chief Justice Marshall's opinion in *American Insurance Co.* v. *Canter* and later cases:

> Certainly no such courts could be created within a State excepting under the judicial clause [meaning Article III, section 1]. (Ib., 267.) * * * The power of Congress over the Territories of the United States is general and plenary arising from * * * the power given by the Constitution to make all needful rules and regulations respecting the territory or other property belonging to the United States (ib., 268).

Accepting this decision as sound constitutional law, it follows, beyond any logical doubt, that the power of Congress over the District of Columbia is just as general and plenary as the power to make "all needful rules and regulations respecting the territory or other property belonging to the United States."

If any logician can see any distinction between that power and the power to "exercise exclusive jurisdiction in all cases whatsoever over such district (not exceeding 10 miles square) as may by cession of particular States and the acceptance by Congress become the seat of government of the United States," he ought, if a lawyer, to be of counsel for appellant in this case; he might, perhaps, be able to demonstrate (what this court has decided to be impossible) that a court of the United States can be established under Article III, section 1, *somewhere else than in one of the United States.*

In all the decisions affecting the Territories, we find the District of Columbia classified as a Territory, and in the very decision last cited (*Downes* v. *Bidwell*) we find, in respect to judicial jurisdiction, the District of Columbia classified with the Territories as deriving judicial power not from Article III, section 1, but from Article IV, section 3, clause 2, or Article I, section 8, clause 17. It is nowhere *held* in any reported case that a Territorial court is a court of the United States (ib., 364) nor that a court established by Congress for the District of Columbia is a United States court. The functions of judges of United States courts are a part of the judicial power of the United States. The United States courts can not exercise any jurisdiction of any cause unless it is granted pursuant to Article III. From what source do the courts of the District of Columbia derive their jurisdiction? Not from that article—much of it is assimilated to United States judicial jurisdiction, but

most of it is conferred by Congress in its exercise of the power to legislate for a Territory as a State does for a county, and Congress could not confer any such State jurisdiction upon any United States court. (*Downes* v. *Bidwell*, 182 U.S., 267; *De Lima* v. *Bidwell*, ib., 196, citing *National Bank* v. *County of Yankton*, 101 U.S., 129.)

CONCLUSION.

The term "courts of the United States," as used in the opinions of this court, refers generally to Federal courts organized under the provisions of section 1, Article III, of the Constitution.

Territorial courts are organized by Congress under the general authority of clause 2, section 2 of Article IV of the Constitution, to establish rules and regulations for the government of the Territories. Congress, by another provision of the Constitution, was vested with full authority to prescribe the government of the Territories, and by Article I, section 8, clause 17, to exercise exclusive legislation over the seat of government. Acting within this authority, a judicial system has been provided for the organized Territories and the District of Columbia. It is not essential that that system should be perfectly uniform. The matter of the tenure of office of the judges is entirely within the discretion of Congress. It may prescribe in one Territory that the tenure of the office of judges shall be for four years; in another six, and in another, as was done in the organization of the Northwest Territory and the Territory of Columbia and the Territory of Wisconsin, "during good behavior."

Hence the mere fact that the tenure of office of the judges of the Supreme Court of the District of Columbia is during good behavior has nothing to do with a determination of the question whether or not that court is a court of the United States, within the provisions of section 1 of Article III of the Constitution, or whether or not its judges are within the provisions of section 714 of the Revised Statutes.

It is contended, however, that the District of Columbia can not be treated as a Territory of the United States, because it originally belonged to the sovereign States of Virginia and Maryland, and having been once under the Constitution as parts of those States it could never be divested of any rights so acquired. We think there will be no contention as to the fact that the Constitution of the United States was adopted primarily as the organic law of the Thirteen original States constituting the Union, and for such other States as might thereafter be admitted into the Union upon a common and equal footing with the original States; that it granted to Congress "the power to exercise exclusive legislation in all cases whatsoever over such District [not exceeding ten miles square] as may, by cession of particular States, and the acceptance of Congress, become the seat of the Government of the United States;" that in its general provisions it did not apply to or extend over territory belonging to or ceded to the United States, excepting its fundamental principles for the protection of the life, liberty, and property of citizens of the United States; the right of trial by jury, and certain other rights

guaranteed to every citizen within the territorial limits of the United States, whether the government there existing be that of a sovereign State or of a Territory. But these fundamental rights can be as well protected, and due process of law as well afforded, by courts organized by Congress as part of the machinery for the government of Territories as by courts organized under section 1 of Article III of the Constitution.

Hence it is our contention that even though originally the District of Columbia formed parts of the States of Virginia and Maryland, and the Constitution was thereby extended to and over the inhabitants of that district or territory, yet when the States of Maryland and Virginia ceded that district to the United States they relinquished all sovereignty of every kind or description whatsoever over it. The United States courts operating and having jurisdiction within the States of Maryland and Virginia ceased to exercise any jurisdiction over the District of Columbia. Immediately upon the cessions by these States of parts of their territory for a seat of Government to the United States it became when accepted by Congress a part of the territory of the United States, the government of which was exclusively vested by the Constitution in Congress. The Constitution made special provision for the government of the seat of government. It reserved to Congress absolute and exclusive legislative authority over the seat of government, whenever and wherever it might be located. It, therefore, was provided for by the Constitution

as completely and as distinctly separated from the States as were the Northwest Territory and the Territories that might thereafter be acquired. The entire government of the District—legislative, judicial, and executive—is in the hands of Congress. The courts of the District are the creatures of Congress. The judges of the District are subject to the legislative will of Congress, and are appointed by the President under Article II, section 2, clause 2 of the Constitution as are the judges of other organized Territories. What is the District of Columbia? It is not a part of the United States within the meaning of the Constitution relating to the Thirteen original States and the States that have since been admitted into the Union upon a common footing with them; it formed no part of the national compact that framed and adopted the Constitution as the organic law of the Union of the States; it has no representation; it is accorded no voice in the affairs of the Government; its citizens have no political suffrage in the choice of legislative and executive officers of the Government; it is simply a permanently organized Territory of the United States.

It is contended by counsel for appellant that because the Supreme Court of the District of Columbia has conferred upon it by Congress the jurisdiction of a circuit court of the United States it is therefore a court organized under the provisions of section 1, Article III, of the Constitution. It is true that that court has the jurisdiction of a circuit court of the United States, but it is only *assimilated jurisdiction*,

so have the territorial courts of New Mexico and Oklahoma and Porto Rico like jurisdiction. This is but a convenient way of declaring the jurisdiction of the Supreme Court of the District of Columbia and the like courts for the other Territories. Congress has treated the District of Columbia as a Territory of the United States, and as nearly as possible as a State in order to secure to its inhabitants the fundamental rights and privileges of a republican form of government. From time to time Congress has extended the Constitution to the territory of the United States as the same has been acquired. It was extended by act of Congress to the territory north of the Ohio; it was extended by act of Congress to the territory acquired by the Louisiana purchase; it has been extended by act of Congress to the Territories from time to time, until finally it is codified into a general provision of the Revised Statutes, which is as follows:

> SEC. 1891. The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized Territories, and in every Territory hereafter organized, as elsewhere within the United States.

It was unnecessarily extended to the District of Columbia by the act of Congress of February 21, 1871 (16 Stat., 419, 426, sec. 34).

It may be observed here that this act provided a new form of government by giving the District an

executive and legislative branch, and, moreover, it is noticeable that the Forty-first Congress expressly recognized the Territorial status of the District by enacting:

> SEC. 25. That the judicial courts of said District shall remain as now organized until abolished or changed by act of Congress.

This in the same act that extended the Constitution to the District.

It follows from the foregoing that the matter of the salary and tenure of office of the judges of the courts of the District of Columbia being entirely subject to the legislative will, Congress could increase or diminish the salary of Judge James from time to time as it saw fit. We submit that the judgment of the Court of Claims should be affirmed.

Respectfully submitted.

JOSIAH A. VAN ORSDEL,
Assistant Attorney-General.

FELIX BRANNIGAN,
Assistant Attorney.

O

FILE COPY.

SUPREME COURT, U.S.
FILED
APR 22 1949
CHARLES ELMORE CROPLEY
CLERK

No. 315

In the Supreme Court of the United States

October Term, 1948

[illegible]

[illegible]

In the Supreme Court of the United States

OCTOBER TERM, 1905.

HARRIET T. JAMES, ADMINISTRATRIX OF Charles P. James, deceased, appellant,
v.
THE UNITED STATES, APPELLEE.
No. 215.

APPEAL FROM THE COURT OF CLAIMS.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES, APPELLEE.

STATEMENT.

Since the brief of appellee was printed and filed we have discovered certain matters that we think pertinent to this case, and, with the consent of the court, submit the same for its consideration in connection with our original brief.

I.

If the provision in the appropriation act of 1891 repealed the general salary act of 1886, which we do not admit, it was because the appropriation act contained a provision that the amount appropriated

"should be full compensation for the services for the fiscal year," and the further provision "that all acts or parts of acts in conflict with this act are hereby repealed."

These same provisions are in the appropriation act of 1892, where the salary was again fixed at $4,000. The provision for $5,000 compensation in the act of 1891 was in conflict with the provision for $4,000 compensation in the act of 1892; hence if the acts are to be given repealing force, the act of 1892 repealed the act of 1891 and the salary of Judge James at the time of his retirement, so far as the acts of Congress are concerned, was $4,000, and if, as we contend, he was the judge of a legislative court, Congress had the power to so reduce his compensation from the amount fixed in the act of 1891.

The paramount question is, what was the legal salary of Judge James when he retired, not what was he paid? The crucial test to be applied is, had Judge James when he retired on December 1, 1892, a cause of action against the Government for the difference between the salary as then fixed and which he was thereafter paid under the provisions of section 714, and the salary as fixed by the act of 1891. No such legal obligation could possibly exist; therefore the act of Congress appropriating a deficiency in 1895 was not founded upon any legal obligation, but was a mere bounty. Since the Supreme Court of the District of Columbia is only a legislative court, Congress could raise or reduce the salary at will, and assuming for the purpose of this argument that Judge James was

entitled to avail himself of the provisions of section 714, Revised Statutes, he could only do so to the extent of the legal salary he was entitled by law to receive at the date of his retirement. Upon his retirement, any right, if any, that he had to receive compensation from the Government was by virtue of section 714, and such right could only be measured by the legal salary to which he was entitled at the date of his retirement, and not by any subsequent bounty which Congress might bestow.

II.

Referring to the interpretation that Congress has placed from time to time upon the political status of the District of Columbia, and our contention that Congress has regarded the courts of the District of Columbia as courts created by Congress under the power reserved to it in clause 17, section 8, Article I of the Constitution, special attention is called to the act of February 1, 1871. Under this act Congress created a Territorial government for the District of Columbia. In the first section of that act (16th Stats., p. 419) appears the language generally used by Congress in the organization of Territories of the United States, namely:

> That all that part of the territory of the United States included within the limits of the District of Columbia be, and the same is hereby, created into a government by the name of the District of Columbia, etc.

The word "territory" is there used in the sense that it is generally used by Congress and by the courts as

referring to the territory of the United States not included within the States. It refers to territory belonging to the United States. Under this act Congress established a territorial government for the District of Columbia, provided for the appointment of a governor, the election of a legislature, and conferred upon that legislature the general legislative authority vested in the legislatures of the various Territories. Among other things in section 25, page 424, Congress provided—

> That the judicial courts of said District shall remain as now organized until abolished or changed by act of Congress; that such legislative assembly shall have power to pass laws, modifying the practice thereof, and conferring such additional jurisdiction as may be necessary to the due execution and enforcement of the laws of said District.

Before the Supreme Court of the District of Columbia can be declared a court of the United States, ordained and established under Article III of the Constitution, it will be necessary to declare the above expression of Congress unconstitutional, for no Territorial legislature has any power to confer jurisdiction upon a court of the United States established under Article III of the Constitution, nor has Congress any power to delegate its legislative authority to any inferior legislative body for that purpose.

III.

In support of the argument set forth in our brief, to the effect that section 714 Revised Statutes applies only

to judges of the courts of the United States, ordained and established under Article III of the Constitution, it is submitted that all the legislation regarding this matter points directly to the judges of constitutional courts and not to the judges of legislative courts. This provision of the statute was originally enacted as the only means by which superanuated judges of the Federal courts could legally be retired. No such necessity arose as to legislative courts, whether their tenure of office be during good behavior or not, for the Congress had power to retire those judges and fill their places, and undoubtedly the President, in the exercise of his Executive authority, would have like power. In 16th Stats., 81, where Congress, by special act, retired the United States district judge for the Eastern District of Texas before he had reached the age of 70 years, the act of Congress is entitled "An act to facilitate the administration of justice in the State of Texas." Congress was not pensioning the district judge for the Eastern District of Texas. It was legislating in the only way it could, to put in his place a man physically able to perform the duties of that office, and that was the intention of Congress when it passed the general provision contained in section 714.

Respectfully submitted.

JOSIAH A. VAN ORSDEL,
Assistant Attorney-General.

O

Supreme Court of the United States.

No. 215.—October Term, 1905.

Harriet T. James, Administratrix of Charles P. James, deceased, Appellant, *vs.* The United States. } Appeal from the Court of Claims.

[May 21, 1906.]

Mr. Justice White delivered the opinion of the Court.

Charles P. James was an Associate Justice of the Supreme Court of the District of Columbia. On December 1, 1892, being over seventy years of age and having served for more than ten years, he resigned his office. He died on August 8, 1899. This suit was brought by the administratrix of the estate of Justice James, on June 30, 1900, to recover $6,688.90, on the ground that the salary of Justice James at the time of his resignation was five thousand dollars per annum, and that after his resignation and up to the time of his death he was paid, under the provisions of Rev. Stat. sec. 714, only at the rate of four thousand dollars per annum, upon the erroneous theory that that sum was the rate of salary fixed by law at the time of the resignation. From a judgment rejecting the claim (38 C. Cls. R. 615) this appeal was prosecuted.

To comprehend the contentions pressed at bar it is necessary briefly to refer to the statutes fixing the salary of the Justices of the Supreme Court of the District of Columbia in force at the time of and after the date of the resignation of Justice James.

By the second section of the act of June 1, 1866, (14 Stat. 55,) the annual salary of the Chief Justice of the Supreme Court of the District of Columbia was fixed at four thousand five hundred dollars, and of each Associate Justice at four thousand dollars. This provision continued in force up to and including the fiscal year ending June 30, 1891. The act (26 Stat. 947) making appropriations for judicial salaries, etc., for the fiscal year commencing July 1, 1891, and ending June 30, 1892, contained the following provision:

"For salaries of the Chief Justice of the Supreme Court of the District of Columbia and the five Associate Judges, at the rate of five thousand dollars per annum each; thirty thousand dollars."

The law containing this provision had the enacting clause usually found in appropriation acts, declaring that the appropriations were made in full

compensation for the services of the fiscal year to which the acts related, and the last section of the act repealed all acts or parts of acts inconsistent or in conflict with its provisions. Under this act Justice James was paid for the fiscal year referred to a salary at the rate of five thousand dollars per annum.

The appropriation act for the following fiscal year, commencing July 1, 1892, and ending June 30, 1893, contained an appropriation of a lump sum of $24,500 "to pay the salaries of the Chief Justice and Associate Justices of the Supreme Court of the District of Columbia." The sum thus appropriated was only adequate to pay the salaries of the Associate Justices at the rate of four thousand dollars per annum each, and this act also contained the general enacting and concluding clauses above referred to.

For the five months of the year covered by this last act, up to his resignation, viz., from July 1, 1892, to December 1, 1892, Justice James was paid at the rate of four thousand dollars per annum. Shortly after his resignation, before the expiration of the fiscal year covered by the lump appropriation for the year commencing July 1, 1892, and ending June 30, 1893, Congress, by the act of February 9, 1893, (27 Stat. 430,) created the Court of Appeals of the District of Columbia. By the terms of the act its provisions were not to take effect until April 3, 1893. It was provided in the fourteenth section of the act that "Justices of the Supreme Court of the District of Columbia shall hereafter receive an annual salary of five thousand dollars each, payable quarterly at the Treasury of the United States." As the lump appropriation made in the act above referred to for the fiscal year ending June 30, 1893, was adequate only to pay the salaries at the rate of four thousand dollars per annum, it followed that the existing appropriation was not adequate to pay the salaries of the Justices of the Supreme Court of the District of Columbia at the rate of five thousand dollars per annum from the date fixed for the going into effect of the Court of Appeals act, that is, from April 3, 1893, to the end of the fiscal year. To remedy this, in the deficiency appropriation act of March 3, 1893, (27 Stat. 653,) there was appropriated a sum which, added to the previous lump appropriation, was adequate to pay to the Justices of the Supreme Court of the District a salary at the rate of five thousand dollars per annum from April 3, 1893, to the end of the fiscal year. For the following fiscal years, it is conceded, regular appropriations were made for the salaries of the Justices of the Supreme Court of the District of Columbia at the rate of five thousand dollars per annum. The deficiency appropriation act of March 2, 1895, contained an appropriation, (28 Stat. 851,) "to pay the Chief Justice and five Associate Justices of the Supreme Court of the District of Columbia the difference between the rate of com-

pensation received by them and five thousand dollars per annum for the fiscal year eighteen hundred and ninety-three." In virtue of this appropriation Justice James was paid for the portion of the fiscal year (from July 1, 1892, to June 30, 1893) covered by the lump appropriation, that is, up to the time of his resignation, on December 1, 1892, a sum which, added to the four thousand dollars appropriated in the lump appropriation act for that fiscal year, made his salary at the rate of five thousand dollars per annum.

On behalf of the administratrix the contention is that the appropriation at the rate of five thousand dollars per annum made for the fiscal year from July 1, 1891, to June 30, 1892, operated as an increase of the salary to that amount, and that this increase was not repealed by the subsequent legislation, or, if intended to be repealed, the repealing act was void, because the Supreme Court of the District of Columbia was an inferior court of the United States within the meaning of section 1, article III, of the Constitution, and therefore, as Congress had increased the salary to five thousand dollars, it was without power to reduce it.

The opposing contention is that the only effect of the appropriation for the fiscal year ending June 30, 1892, was to temporarily raise the salary for that year, and that as in the subsequent year only a lump sum adequate to pay at the rate of four thousand dollars per annum was appropriated, the general law of 1866 governed, and that amount became the salary which by law was payable to Justice James at the time of his resignation. And it is insisted that Congress was vested with power to increase and diminish at pleasure the compensation paid to a justice of the Supreme Court of the District of Columbia, because that court was not one of the courts referred to in section 1 of article III of the Constitution. Indeed, irrespective of the question of what was the rate of salary payable to Justice James at the time of his resignation, the Government contends that the judgment below should be affirmed, because in any event the Supreme Court of the District of Columbia was not a court of the United States within the intendment of Rev. Stat. section 714, and in consequence the judges of that court were not entitled on resignation to the benefits intended to be conferred thereby.

From the view we take of the case it is unnecessary to consider the constitutional questions which are raised by the opposing parties. We say this because if the result of an analysis of the legislation of Congress be to establish that the salary by law payable to Justice James at the time of his resignation was five thousand dollars per annum, it will be superfluous on that branch of the case to intimate any opinion as to whether the Supreme Court of the District of Columbia is a court of the United States within the meaning of section 1 of article III of the Constitu-

tion. Likewise, on the second branch of the case, if it be concluded that the justices of the Supreme Court of the District of Columbia are embraced within the provisions of section 714 of the Revised Statutes, irrespective of whether that court is or is not an inferior court within the meaning of the constitutional provision above referred to, it will be likewise superfluous to consider the question of constitutional power.

It is not disputed that by the express terms of the appropriation act for the fiscal year ending June 30, 1892, the salaries of the justices of the Supreme Court of the District of Columbia were increased to five thousand dollars per annum, at least for that year. As, however, the appropriation for the next fiscal year—the one in which Justice James resigned—was only of a lump sum adequate to pay four thousand dollars per annum, it is insisted that that amount was the salary payable to Justice James at the date of his resignation. Whether, if the act appropriating the lump sum stood alone, it would sustain the contention based upon it, we are not called upon to decide, since we may not merely consider the lump appropriation, but must also take into view the act of March 2, 1895, (26 Stat. 851) relating to the identical subject, viz., the salary for the fiscal year ending June 30, 1893, payable by law to the justices of the Supreme Court of the District.

The act of March 2, 1895, appropriated to pay as a deficiency to the Chief Justice and the five Associate Justices of the Supreme Court of the District of Columbia a sum representing the difference between the rate of compensation theretofore received by them and five thousand dollars per annum for the fiscal year 1893, the year in which Justice James resigned. Now that act is susceptible of only one of two constructions, viz., either that it was a legislative declaration to the effect that the increase of salary operated by the specific provision contained in the appropriation act for the fiscal year ending June 30, 1892, was a permanent provision and had not been repealed by the lump appropriation made in the act of the following year, or that it was intended retroactively to fix the salaries of the justices of the Supreme Court of the District of Columbia for the fiscal year 1893 at the sum of five thousand dollars, a power which Congress undoubtedly possessed. (*Stockdale* v. *Atlantic Insurance Company*, 20 Wall. 323, 331–332.) Whichever view is adopted the legal proposition inevitably arises that the salary of the justices of the Supreme Court of the District of Columbia payable by law for the fiscal year of 1893 was the sum of five thousand dollars. Indeed, as a matter of fact under the operation of the deficiency appropriation, the salary actually paid to Justice James for the portion of the fiscal year up to the time of his resignation was at the rate of five thousand dollars per annum. It is no answer to this deduction to say that as the effects just indicated arose from the act of 1895, therefore they could not have existed in the fiscal year of 1893 when Justice James resigned;

for this would be but to deny efficacy to the act of 1895, either as a Congressional interpretation of the prior legislation or as a retroactive statute fixing the salaries for the year 1893.

As Congress had the power, wholly irrespective of the prior legislation, retroactively to fix the salary payable to a justice of the Supreme Court of the District of Columbia for an antecedent year, and as the effect of the act of 1899 was necessarily a determination by Congress that the salary payable to Justice James for the year during which he resigned was five thousand dollars, we are not at liberty to disregard the retroactive effect of the act of Congress by holding that the salary payable to him by law for the year during which he retired was a less sum than the amount which Congress, in the exercise of its plenary authority in the premises, has declared was the lawful salary.

The salary of Justice James for the period just referred to being then at the rate of five thousand dollars per annum, it is obvious that he was within the terms of Rev. Stat. section 714, if the provisions of that section applied to justices of the Supreme Court of the District of Columbia. That section is as follows:

"SEC. 714. When any judge of any court of the United States resigns his office, after having held his commission as such at least ten years, and having attained the age of seventy years, he shall, during the residue of his natural life, receive the same salary which was by law payable to him at the time of his resignation."

On behalf of the Government it is, as we have said, contended that Justice James was not entitled to the benefit of this statute, because that statute only embraced judges of such courts of the United States as were within the purview of section 1 of article III of the Constitution, and it is insisted the Supreme Court of the District of Columbia was not so embraced. We think the premise upon which this contention rests is wholly devoid of merit. The words of the statute, "when any judge of any court of the United States resigns his office," are broad enough to embrace all courts created by the United States, without taking into view the particular constitutional authority which was exercised in such creation. It is true that the statute excludes the conception that it was intended to apply to judges of courts created by Congress when the term of office was of a limited duration. Conversely, however, in our opinion, the text of the statute leaves no room for question that its provisions were intended to apply to a judge of any court of the United States holding his office by a life tenure, such as during good behavior. Indeed, as it is conceded at bar, that from the period of the enactment of the statute down to the present time it has, without interruption or deviation, been construed by the legislative and executive departments of the Government as applicable to

justices of the Supreme Court of the District of Columbia, we do not deem it necessary to determine whether the Supreme Court of the District of Columbia is an inferior court within the meaning of section 1 of article III of the Constitution, since even if it be not a court of that character it is nevertheless a court of the United States within the meaning of Rev. Stat. section 714.

The judgment is reversed and the case remanded with directions to enter a judgment for the petitioner.

True copy.

Test:

Clerk Supreme Court, U. S.